Supreme Court, U.S.
FILED
OCT 2 1985
JOSEPH F. SPANIOL, JR.
CLERK

85-573

No.

IN THE

Supreme Court of the United States

OCTOBER TERM 1985

PUBLIC SERVICE COMPANY OF COLORADO,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, and
COLORADO RIVER WATER CONSERVATION DISTRICT,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED *

The Federal Energy Regulatory Commission purported to assess charges against petitioner under the Federal Power Act for certain "headwater benefits" allegedly conferred on a hydroelectric project that is operated by petitioner under an Interior Department permit issued in 1903. The permit nowhere reserved the right to assess such charges. The questions presented are:

1. Whether section 23(a) of the Federal Power Act, preserving the rights of pre-1920 permittees, prohibits headwater charges against the holders of permits that do not provide for such charges.

2. Whether assessment of the charges violated water rights protected by section 27 of the Federal Power Act, and explicitly recognized in a 1955 consent decree in litigation to which the United States was a party.

3. Whether under section 10(f) of the Federal Power Act the FERC may collect from a pre-1920 permittee the agency's costs in calculating headwater benefit charges assessed against the permittee itself.

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* All parties to the proceeding in the court below are named in the caption of this petition.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Public Service Company of Colorado ("Public Service Company") petitions for certiorari to review the judgment of the Court of Appeals for the Tenth Circuit in this case.[1]

OPINIONS BELOW

The opinion of the Court of Appeals, which is reported at 754 F.2d 1555, appears as Appendix A. The Court of Appeals affirmed an order of the Federal Energy Regulatory Commission ("FERC") concerning liability for certain "headwater benefits" payments, which order, issued February 10, 1982, is reported at 18 FERC (CCH) ¶ 61,110 (Appendix B), and an order denying rehearing as to such liability issued by the FERC on August 4, 1982, which order is reported at 20 FERC (CCH)

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[1] Public Service Company has one subsidiary, Home Light and Power Company, that is not wholly-owned.

¶ 61,149 (Appendix C). The Court of Appeals' decision also affirmed an order by the FERC concerning liability for certain "investigative costs" issued December 21, 1983, 25 FERC (CCH) ¶ 61,399 (Appendix D), and an order issued February 16, 1984, denying rehearing as to such costs, which is reported at 26 FERC (CCH) ¶ 61,180 (Appendix E). A decision of April 26, 1983, by an FERC administrative law judge concerning investigative costs, reported at 23 FERC (CCH) ¶ 63,036, appears as Appendix F. The Court of Appeals' order denying rehearing is set forth in Appendix G.

JURISDICTION

The Court of Appeals' decision, which constitutes its judgment in this case, was issued on February 15, 1985, and entered on the same date. The Court of Appeals denied rehearing by order of June 4, 1985. By order dated August 21, 1985, Mr. Justice White extended until October 2, 1985, the time within which to petition for certiorari. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Sections 10(f), 23(a), and 27 of the Federal Power Act, 16 U.S.C. §§ 803(f), 816, and 821, appear in Appendix H. The Act of February 15, 1901, 31 Stat. 790, appears in Appendix I.

STATEMENT OF THE CASE

A. The Shoshone and Green Mountain Plants

Petitioner Public Service Company owns and operates the Shoshone hydroelectric plant on the Colorado River, within the White River National Forest. The plant was originally constructed, and continues to operate, under a permit issued by the Secretary of the Interior in 1903, prior to the creation, in 1920, of the Federal Power Commission ("FPC") and of the

hydroelectric licensing scheme embodied in the present Federal Power Act, 16 U.S.C. §§ 791a-823a. Shoshone, which was completed in 1909, depends on the direct flow of the river, diverted by a dam into a tunnel, and thence through turbines, to generate power. Water used at Shoshone to generate power returns to the Colorado undiminished in quantity and is available for further use downstream. Under Colorado state water law, Public Service Company holds a right to 1,250 cubic feet per second ("c.f.s") for use in generating power at Shoshone, with a "priority date" of January 7, 1902.[2]

Some 100 miles upstream of Shoshone, on the Blue River (a tributary of the Colorado), is located the Green Mountain Reservoir, operated by the Bureau of Reclamation. The Green Mountain installation, which consists of a dam, reservoir, and power plant, is part of the Colorado-Big Thompson Project. Authorized by Congress in 1937, that project was designed primarily to redirect waters from the Colorado River watershed across the Continental Divide for use by agricultural interests on the Eastern Slope of the Rockies. Legislation authorizing the Colorado-Big Thompson Project (50 Stat. 595) directed that it be "constructed in accordance with the plans set forth in Senate Document Numbered 80, Seventy-fifth Congress", portions of which appear in Appendix J.

Senate Document No. 80 reflected a compromise between Eastern Slope and Western Slope interests in Colorado. It specified that Green Mountain Reservoir was to have a capacity of 152,000 acre-feet of water. Of that amount, 52,000 acre-feet

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[2] In 1956 Public Service Company secured the right to an additional 158 c.f.s. with a priority date of May 15, 1929, as the result of a new determination of Shoshone's flow capacity. For sake of simplicity this subsequent right is not discussed further below; it is not, however, any different from the initial right to 1,250 c.f.s. for purposes of the arguments that follow.

were to be "available as replacement in western Colorado of the water which would be usable there if not withheld or diverted by said project" east of the Divide.[3] As to the remaining 100,000 acre feet, it provided:

> (c) Said 100,000 acre-feet shall be stored primarily for power purposes, and the water released shall be available, without charge, to supply existing irrigation and domestic appropriations of water, including the Grand Valley reclamation project, to supply all losses chargeable in the delivery of said 52,000 acre-feet of water, and for future use for domestic purposes and in the irrigation of lands thereafter to be brought under cultivation in western Colorado. It shall be released within the period from April 15 to October 15 of each year as required to supply a sufficient quantity to maintain the specified flow of 1,250 cubic feet per second of water at the present site of said Shoshone diversion dam, provided this amount is not supplied from the 52,000 acre-feet heretofore specified. Water not required for the above purposes shall also be available for disposal to agencies for the development of the shale oil or other industries.

Having specified that such releases past Shoshone were to be "without charge", Senate Document No. 80 immediately went on to prescribe the manner in which costs of Green Mountain *were* to be borne:

> (d) The cost of construction and perpetual operation and maintenance of said reservoir or reservoirs shall be a charge against the project and shall be paid from revenues collected from this project as may be provided in contracts between the Secretary of the Interior and the beneficiaries of the project in eastern Colorado, and any other contracting parties.

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[3] Senate Document No. 80, 75th Cong., 1st Sess. 3 (1937) (Pet. App. 2j). That replacement water was to be released, on demand, whenever "the flow of the Colorado River at the present site of [the Shoshone plant] is less than 1,250 cubic feet per second" in order to fill vested appropriation rights. *Id.* "Pet. App." refers to the appendices to this petition.

Following completion of the Green Mountain Reservoir in 1942, there were extended court proceedings to adjudicate water rights of users on the Blue River and other tributaries of the Colorado. Protracted negotiations involving the federal government and other users led in 1955 to a comprehensive settlement of those proceedings under which the United States received direct flow and storage rights for Green Mountain with a priority date of August 1, 1935. The final order (the "Blue River Decree") embodied that settlement and provided that the entire Project was to be operated in accordance with Senate Document No. 80.[4] The following year, Congress enacted a statute reaffirming the decree and directing that federal government agencies "shall act in accordance therewith." [5]

B. Federal Power Legislation

Prior to enactment of the Federal Water Power Act ("Water Power Act") in 1920, Congress authorized dams across navigable streams or on public lands under a series of statutes, some of which delegated the power of authorizing individual projects to specific officers within the Executive Branch.[6] The Act of February 15, 1901, 31 Stat. 790 ("the 1901 Act"), under which the Shoshone permit issued, was among these early statutes.

In 1906 Congress enacted the General Dam Act, 34 Stat. 386, adopting standard conditions for permits to construct and operate dams across navigable streams under supervision of the War Department; a 1910 amendment, 36 Stat. 593, directed the War Department to assess against permittees a portion of certain costs borne by the federal government in constructing and operating upstream reservoirs. The rationale for such levies was that, by storing water in high-flow times and

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[4] References to the extended litigation are provided in the opinion below. 754 F.2d at 1560-61 (Pet. App. 7a-8a).

[5] Colorado River Storage Project Act, 70 Stat. 105, 110 (1956), codified at 43 U.S.C. § 620j.

[6] See J. Kerwin, *Federal Water-Power Legislation* 105-130 (1968).

releasing it in times of diminished flow, the upstream reservoir conferred "headwater benefits," in particular augmented power-production capability, on the permittee's project downstream.

Eighteen years after the priority date of Public Service Company's water right at Shoshone, Congress enacted the Water Power Act, 41 Stat. 1063, vesting for the first time in a single agency, the Federal Power Commission, the exclusive power to issue licenses for projects to be built thereafter on navigable streams or public lands. Of particular importance here, section 10(f) required that *future* licensees pay to the operators of upstream projects headwater benefits charges fixed by the Commission. 41 Stat. 1070. In 1935 the Water Power Act was amended and re-enacted as Part I of the new Federal Power Act, 49 Stat. 838. Among other things Congress modified section 10(f) to provide (1) that owners of certain pre-1920 projects, like Commission licensees, were to pay headwater benefits charges; and (2) that licensees and permittees were, in certain circumstances, to bear the Commission's own investigative costs in determining headwater benefits charges. 49 Stat. 843-44.

At the same time, Congress in 1935 substantially re-enacted section 23 of the Water Power Act and entitled it "Preservation of Rights Vested Prior to June 10, 1920". As section 23(a) of the Federal Power Act it reads, in pertinent part, as follows:

> The provisions of this subchapter shall not be construed as affecting any permit or valid existing right of way granted prior to June 10, 1920, or as confirming or otherwise affecting any authority heretofore given pursuant to law. 16 U.S.C. § 816.

Similarly, Congress in 1935 re-enacted section 27 of the Water Power Act, entitling it "State Laws and Water Rights Unaffected":

> Nothing contained in this chapter shall be construed as affecting or intended to affect or in any way to interfere with the laws of the respective States relat-

> ing to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein. 16 U.S.C. § 821.

In 1976 Congress repealed the legislation under which the Shoshone permit had issued. 90 Stat. 2793. In so doing, however, it again expressly preserved the rights of existing permittees.[7]

C. The Proceedings in This Case

In December, 1974, more than 30 years after completion of the Green Mountain Reservoir, the FPC notified Public Service Company of a Commission staff proposal to levy headwater benefits charges under section 10(f) for the use at Shoshone of waters released from Green Mountain. In 1979, after further correspondence, the Federal Energy Regulatory Commission, successor to the FPC,[8] issued a formal notice proposing to assess Public Service Company (1) headwater benefits charges, and (2) additional charges for the costs of the investigation itself. The Company objected, pointing out that the Company's water rights, as recognized under state law and the Blue River Decree, and its rights as holder of the 1903 permit (in contrast to a post-1920 license under the Federal Power Act), precluded any liability for headwater benefits payments. By orders in February and August 1982 (Pet. App. B, C), the FERC held that the Company was liable for headwater benefits, and the Company petitioned for review in the Tenth Circuit.[9]

Public Service Company and the Commission staff then agreed as to the amount of the headwater benefits charges and investigative costs owing in the event that the Commission

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[7] "Nothing in this Act, or in any amendment made by this Act, shall be construed as terminating any valid lease, permit, patent, right-of-way, or other land use right or authorization existing on the date of approval of this Act." 90 Stat. 2786.

[8] The functions of the FPC were transferred to the FERC in 1977 under the Department of Energy Organization Act, 91 Stat. 565.

[9] Review was sought under section 313 of the Federal Power Act, 16 U.S.C. § 825*l*, and the Court of Appeals' jurisdiction is based upon that statute.

orders as to liability were upheld. However, the Company challenged the Commission's authority to collect investigative costs under the statute. In a decision issued April 26, 1983 (Pet. App. F), an FERC administrative law judge sustained those objections in light of the language of section 10(f) and the underlying legislative history. The Commission reversed in an order issued December 21, 1983 (Pet. App. D), and held the Company liable for investigative costs as well. Rehearing having been denied (Pet. App. E), the Company petitioned for review in the Tenth Circuit, and that court consolidated the two cases.

The Court of Appeals affirmed the agency's orders. 754 F.2d 1555 (Pet. App. A). It held Public Service Company liable for headwater benefits, and it rejected the Company's claim that such liability impaired rights expressly reserved under the Federal Power Act itself, under state water law, and under Senate Document No. 80. The court also held the Company liable for investigative costs, despite the statutory language inconsistent with such an award. The Company's request for rehearing was denied without opinion. Pet. App. G.

REASONS FOR GRANTING THE WRIT

The Tenth Circuit's decision effectively ignores section 23 of the Federal Power Act, which explicitly reserves the rights of pre-1920 permittees, and the decision conflicts with the Fourth Circuit's reasoning in *South Carolina Electric & Gas Co.* v. *FPC*, 338 F.2d 898 (4th Cir. 1964). In addition, the decision below conflicts with section 27 of the Federal Power Act and Senate Document No. 80 by attempting to assess benefits based on releases of water to which Public Service Company is *already* entitled under both state and federal law. Finally, in assessing investigative costs, the FERC violated the clear language of section 10(f).

I. THE COMMISSION LACKS AUTHORITY TO LEVY HEADWATER BENEFITS CHARGES ON HOLDERS OF PRE-1920 PERMITS WHICH DO NOT PROVIDE FOR SUCH CHARGES.

The 1901 Act made no provision for the imposition of any manner of charge for releases from upstream reservoirs. It simply authorized the Secretary of the Interior to permit private persons to go upon the public lands to build electric generating plants and distribution facilities "under general regulations to be fixed by him". Those regulations nowhere reserved the authority to levy headwater benefits charges. 31 Pub. Lands Dec. 13-18. Accordingly, the permit for the Shoshone site nowhere suggested that the permittee might later be subjected to such levies. In contrast, the General Dam Act, as amended in 1910, specifically reserved to the Government authority to assess charges for headwater benefits. See p. 5, above.

The pertinent rights of the Shoshone permittee, and indeed the rights of *all* permittees under the 1901 Act, as they existed shortly prior to enactment of the Water Power Act, were determined in *United States* v. *Colorado Power Co.*, 240 F. 217 (D. Colo. 1916). The Government there sought to impose upon the permittee an annual charge based upon the amount of power generated at Shoshone. The court flatly rebuffed that effort. Conceding only the Secretary's "power to require some guaranty or agreement against waste" (damage to the surrounding lands), it held:

> Congress did not manifest any intent to give the Secretary the right and power to acquire for complainant an interest, directly or indirectly, in defendant's plant or business, nor to lay a tax on its product; and to put the defendant's business under public surveillance and thus subject it to examination as to the amount of electrical energy produced and disposed of, for the purpose of laying tribute thereon as a basis of a charge to be fixed by the Secretary, is to carry the power granted to him to a doubtful length and further than, I think, is given by the Act. 240 F. at 221.

Thus, when Congress in 1935 extended headwater benefits liability to permittees, it had long-since been judicially established that permittees under the 1901 Act, and the holder of the Shoshone permit in particular, could not be assessed charges, other than charges for waste.[10]

In amending section 10(f) in 1935, Congress did not repeal section 23(a), which protects against impairment of permits granted prior to 1920. Rather, it re-enacted that provision. The amended section 10(f), extending headwater benefits liability to the operators of certain pre-1920 projects, is no less subject to section 23(a) than any other provision of the Act. To harmonize the two statutes presents no difficulty: clearly, section 10(f) was intended to impose headwater benefits liability on those permittees whose permits in some manner reserved to the Government the authority to impose charges for headwater benefits.[11] Public Service Company's permit, as already explained, reserves to the Government no such right. See p. 9, above.

The sole judicial precedent on the Commission's authority to assess pre-1920 permittees for headwater benefits is *South Carolina Electric, supra.* At issue there was the Stevens Creek Project, which had been constructed under a War Department permit issued under the General Dam Act. The Stevens Creek permit explicitly authorized the Secretary of War to

> fix and collect just and proper charges should any direct benefit be received by said Company from the

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[10] *Colorado Power* also established that the Shoshone permit, although revocable, could not be withdrawn "arbitrarily and without cause". 240 F. at 221. There has been no effort since that decision to revoke the permit.

[11] This conclusion not only makes the two provisions logically consistent, but accords with the legislative history of the 1935 amendment. The committee reports, in describing the pre-1920 permits that would be subject to the new assessments, refer only to War Department permits which, as already noted (p. 5, above), did reserve the Government's right to charge for headwater benefits. *E.g.*, S. Rep. No. 621, 74th Cong., 1st Sess. 45 (1935). Indeed, in the pertinent hearings, the FPC's Solicitor agreed that the new power would turn "somewhat on the terms of the permit" as well as the War Department's authority. *Hearings on H.R. 5423 Before the House Committee on Interstate and Foreign Commerce*, 74th Cong., 1st Sess. 487 (1935).

> construction, operation and maintenance by the United States of storage reservoirs, at the headwaters of said Savannah River. 338 F.2d at 902.

The permittee nonetheless argued that section 23(a) protected it from imposition by the FPC of payments for releases from a Government project upstream.

To resolve the issue, the Fourth Circuit examined South Carolina Electric's rights under the War Department permit.

> In our opinion the saving clause [section 23(a)] does not exempt Stevens Creek. The permit originally admitted the Government's right to assess reasonable charges, and so the exercise of that retained power was merely a step altogether congruent and in keeping with the permit. Hence, it was left unaffected, just as the proviso insists. *Id.*

Similar analysis applied to permits issued under the 1901 Act leads, of course, to the opposite conclusion: levy of headwater charges would "affect" holders' rights under such permits in violation of section 23(a). The Tenth Circuit's holding thus collides squarely with the reasoning of the Fourth Circuit in *South Carolina Electric.*[12]

II. THE COURT OF APPEALS' DECISION DESTROYS VESTED STATE WATER RIGHTS PROTECTED BOTH BY THE FEDERAL POWER ACT AND BY THE BLUE RIVER DECREE.

Under the orders sustained by the Tenth Circuit, Public Service Company is to pay headwater benefits charges based on a nonconsumptive use of water to which it is *already* entitled under both state and federal law. Such an assessment conflicts

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[12] As noted, the Commission made no apparent effort to exercise the authority it now claims for some three decades after construction of the Green Mountain Reservoir. Whether the delay reflects the agency's own assumption that, in light of Public Service Company's permit, there was no authority to impose headwater charges the record does not disclose.

both with section 27 of the Federal Power Act, protecting water rights under state law,[13] and with federal legislation that directly addresses Public Service Company's use of water at the Shoshone plant.

1. The Federal Power Act, under which the FERC assessed headwater benefits in this case, contains a major qualification: section 27 explicitly provides that nothing in the Act can affect or interfere with state water law, including prior "appropriations" of water or "vested rights" acquired under state law. See pp. 6-7, above. It is conceded that under Colorado law Public Service Company is entitled to 1,250 c.f.s. at the Shoshone plant as a "vested property right" under Colorado law. 754 F.2d at 1564 (Pet. App. 14a). Yet the headwater benefit charge levied by FERC is based upon the provision of this same 1,250 c.f.s. to Shoshone, and the Company is therefore being made to pay for water to which it is already entitled under Colorado law.

In the lower court, the FERC never disputed the existence of the Company's right to 1,250 c.f.s. at Shoshone under Colorado law. The FERC argued instead that charging the Company for its use of the water did not "interfere" with that use or, if it did interfere, then the right under state law should be deemed to be overridden by the FERC's power to assess headwater benefit charges. For understandable reasons, the Tenth Circuit refused to adopt either of these arguments.[14] Instead, the Tenth Circuit said that the water released from the upstream federal project, having been used for its "primary purpose" of power generation and released back into the stream, should nonetheless be treated as a discrete "batch" of water, independent of the natural flow of the river from which Public Service Company is entitled to the first 1,250 c.f.s.

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[13] In addition, of course, the Fifth Amendment of the Constitution forbids uncompensated taking of state water rights, as the Court of Appeals apparently recognized. 754 at 1564 (Pet. App. 14a).

[14] As the Tenth Circuit explained, "FERC is forbidden by section 27 . . . from affecting or interfering with state [water] law . . . . If FERC were allowed to assess charges for the use of water to which PSC has a vested right, it would be accomplishing indirectly what it is forbidden to do directly. FERC's position is therefore rejected." 754 F.2d at 1566 (Pet. App. 18a).

The difficulty with this theory—supported by none of the parties below—is that Colorado water law does not qualify Public Service Company's right to the first 1,250 c.f.s. by any such "batch theory". For over 70 years Colorado law has recognized that stored water, once used and returned to the stream, becomes part of the natural flow subject to prior rights of appropriation.[15] Under the substantive law in "Colorado doctrine" states, "it is a fundamental rule that the vested rights of other users or senior appropriators cannot be impaired by storage and delayed use." 5 R. Clark, *Water and Water Rights* 84-85 (1972). The Colorado Supreme Court has repeatedly rejected attempts to create "super rights" to flowing water that are free from the claims of senior appropriators, and the prior appropriation doctrine is embedded in the Colorado Constitution itself.[16]

Section 27 reflects a fundamental federal policy protecting water rights under state law. Under the doctrine widely followed in the western states, water rights derive directly from prior appropriation. The Tenth Circuit has created a theory which, if allowed to stand, would effectively allow any power-generating reclamation project to be treated as creating a new and separate "batch" of water for which charges could be made. The theory would thereby effectively undermine the protection afforded to vested appropriation rights under section 27 of the Act.

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[15] See, *e.g.*, Comstock v. Ramsay, 55 Colo. 244, 133 P. 1107 (1913). See also the United States Water Power Resources Service's proposed operating policy for Green Mountain Reservoir, quoted at p. 14 n. 18, recognizing Green Mountain releases as part of the "natural flow". Of the two Colorado decisions cited by the Tenth Circuit, the first did not involve storage at all, but rather successive use, by measured release and recapture, for irrigation purposes (Sorenson v. Norell, 24 Colo. App. 470, 135 P. 119 (1913)), while the second *rejected* the reservoir owner's claim to retain private rights in a batch of water after it had percolated from the reservoir. Fort Morgan Reservoir and Irrigation Co. v. McCune, 71 Colo. 256, 206 P. 393 (1922).

[16] See, *e.g.*, RJA, Inc. v. Water Users Ass'n of District No. 6, 690 P.2d 823 (Colo. 1984), and Southeastern Colorado Water Conservancy District v. Shelton Farms, Inc., 187 Colo. 181, 529 P.2d 1321 (1975); Colo. Const. art. XVI, § 6, quoted 754 F.2d at 1564 (Pet. App. 14a).

2. The right of the Shoshone plant to 1,250 c.f.s. without charge is protected not only by the general language of section 27, but by later federal legislation that deals *expressly* with the provision of 1,250 c.f.s. from the Green Mountain Reservoir to Shoshone. As seen, Green Mountain Reservoir is part of a project authorized and directed to be operated in accordance with Senate Document No. 80. That document in turn was embodied in a federal consent decree negotiated by, and binding on, the United States, and the terms of the decree were expressly reaffirmed and approved by Congress in 1956. See pp. 3-5, above. The Tenth Circuit conceded that "the terms of Senate Document 80 . . . have the force of a statute." 754 F.2d at 1561 (Pet. App. 8a).

It is clear from both the language and structure of Senate Document No. 80 that the release of stored water from the Green Mountain Reservoir, so far as required to maintain the 1,250 c.f.s. flow at the Shoshone plant, was to be without charge.[17] Yet, the admitted effect of the FERC order sustained by the court below is to charge Public Service Company for the Government's act of maintaining the 1,250 c.f.s. at Shoshone.[18]

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[17] This is implicit in Senate Document No. 80 with respect to the first 52,000 acre-feet governed by subparagraph (b) because—as subparagraph (a) makes clear—that water is merely a "replacement" for use in western Colorado of an equivalent amount being diverted by the Project to the Eastern Slope. As for the additional 100,000 acre-feet governed by subparagraph (c), it is stored "primarily for power purposes," is to be released "without charge" to supply various other uses, and is specifically to be used to maintain the 1,250 c.f.s. at the Shoshone plant between April 15 and October 15 "provided that this amount is not supplied from the 52,000 acre-feet heretofore specified." Pet. App. J.

[18] The federal agency responsible for actually operating the Green Mountain Project in accordance with Senate Document No. 80 has expressed its understanding as follows:

> "Releases from the 100,000 acre-foot power pool will make up natural flow shortages up to the specified flow of 1,250 cubic feet per second at the Dotsero gage [which lies just above Shoshone], from April 15 through October 15. *The Division Engineer shall administer these releases as natural flow. The releases are available for downstream users without charge.*"

United States Water and Power Resources Service (now the Bureau of Reclamation), Proposed Operating Policy for Green Mountain Reservoir. 46 Fed. Reg. 18,801, 18,802 (1981) (emphasis added).

Even if section 27 had not been included in the Federal Power Act, Senate Document No. 80, as embodied in the Blue River Decree and 43 U.S.C. § 620j, would suffice to protect the right of Public Service Company to the use without charge of the 1,250 c.f.s. Senate Document No. 80 constitutes specific legislation, drawn and given the force of law after the enactment of the Federal Power Act. As such it must prevail over section 10(f), to the extent that the two conflict. See *Bulova Watch Co.* v. *United States,* 365 U.S. 753, 758 (1961).

Senate Document No. 80 expressly assigns "the costs of constructing and perpetual operation and maintenance" of Green Mountain to Eastern Slope beneficiaries and others (*e.g.,* power buyers) contracting with the Secretary of the Interior. See p. 4, above. It is precisely those costs, however, that the FERC sought under section 10(f) to recoup here, *i.e.,* "interest, maintenance, and depreciation" for the upstream improvement. In attempting to shift to Public Service Company costs explicitly required to be borne by others, the FERC further flaunted the unambiguous intent of the document.

There is no plausible construction of Senate Document No. 80 that would justify the Tenth Circuit's action.[19] On the contrary, Senate Document No. 80, part of a deliberate and careful compromise reached to permit and govern a major reclamation project, is undone by the lower court's decision; so too is the Blue River Decree, to which the United States, in order to quiet its water rights, voluntarily assented. Quite simply, the Government has now reneged, and, in allowing it to

[19] The Tenth Circuit sought to draw a highly artificial distinction between the first sentence of subparagraph (c), which refers to power and other uses of the stored water and specifically says that they should be without charge, and the second sentence, which reaffirms that the flow be maintained at 1,250 c.f.s. at the Shoshone plant. This reading would produce a remarkable and utterly illogical result: Public Service Company's nonconsumptive use at Shoshone, with a priority senior to the Government and all other upstream uses, would be charged for the releases while consumptive uses—including *subsequent* domestic and irrigation appropriation—would be entitled to receive such water without charge. There is no way to make sense of such an interpretation.

do so, the decision below "so far departed from the accepted and usual course of judicial proceedings" as to call for the exercise of this Court's certiorari jurisdiction. Sup. Ct. R. 17.1(a).

III. THE COURT OF APPEALS MISCONSTRUED THE PLAIN LANGUAGE OF SECTION 10(f) IN ASSESSING INVESTIGATIVE COSTS AGAINST PUBLIC SERVICE COMPANY.

Even if Public Service Company must bear headwater benefit charges at Shoshone, it cannot lawfully be charged for FERC's investigative costs. That much is clear from the express wording and structure of section 10(f), set out in full below, with the portions added in 1935 italicized:

> Reimbursement by licensee of other licensees, etc. That whenever any licensee hereunder is directly benefited by the construction work of another licensee, a permittee, or of the United States of a storage reservoir or other headwater improvement, the Commission shall require as a condition of the license that the licensee so benefited shall reimburse the owner of such reservoir or other improvements for such part of the annual charges for interest, maintenance, and depreciation thereon as the Commission may deem equitable. The proportion of such charges to be paid by any licensee shall be determined by the Commission. *The licensees or permittees affected shall pay to the United States the cost of making such determination as fixed by the Commission.*
>
> Whenever such reservoir or other improvement is constructed by the United States the Commission shall assess similar charges against any licensee directly benefited thereby, and any amount so assessed shall be paid into the Treasury of the United States, to be reserved and appropriated as a part of the special fund for headwater improvements as provided in section 810 of this title.

> *Whenever any power project not under license is benefited by the construction work of a licensee or permittee, the United States or any agency thereof, the Commission, after notice to the owner or owners of such unlicensed project, shall determine and fix a reasonable and equitable annual charge to be paid to the licensee or permittee on account of such benefits, or to the United States if it be the owner of such headwater improvement.* 16 U.S.C. § 803(f)

The provision for payment of investigative costs appears at the end of the first paragraph; that paragraph, by its terms, relates *solely* to situations in which a project *licensed* (as distinct from a project permitted under pre-1920 legislation) is the recipient of benefits conferred by storage at an upstream project.[20] Situations such as the present one, where an *unlicensed* project is benefited by an upstream project are governed, if at all,[21] by the third paragraph, and that paragraph conspicuously lacks any reference to payment of investigative costs.

The Tenth Circuit was unable to explain how, consistently with the language of section 10(f), Public Service Company could be charged with the payment of investigative costs. The Company is clearly not covered by the first paragraph which applies only when a "licensee . . . has directly benefited" from a headwater improvement; and, even if the Company is governed by the third paragraph, which applies when a non-licensee is benefitted, that paragraph does not authorize the imposition of the cost of making the determination. It is not acceptable for the Court of Appeals merely to declare—in the teeth of the statutory language—that under the statute "investigative costs

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[20] The language of the first paragraph makes this plain when it speaks of paying "the cost of making such determination." "Such determination" plainly refers to the determination, specified earlier in the same paragraph, that a "*licensee*" has been "directly benefitted" by the upstream construction work of another licensee, a permittee, or the United States.

[21] We believe, of course, that section 10(f) does not apply to Shoshone in any respect, for the reasons described above at pp. 8-16.

are properly split between both the upstream and downstream projects . . . ." 754 F.2d at 1566 (Pet. App. 20a).[22]

The FERC, insisting that the permittee may be charged with costs under the third paragraph, has likewise offered no rationale that comports with the statutory language. Although the FERC argues that any failure to charge such downstream permittees would produce an anomaly under the statute, the alleged anomaly vanishes under careful examination.[23] The construction urged by the Company is the one reached by the FERC Administrative Law Judge, who carefully examined the language and legislative history of the 1935 amendments and concluded that the statute authorizes levying of investigative costs only if the downstream project is licensed and payment is made by the upstream party benefitting from the payments. Pet. App. 16f.

The issue presented is of continuing significance in the FERC's ongoing administration of the statute. Every year the agency levies significant investigative costs upon large numbers of downstream parties, including downstream permittees. Indeed, the agency's claims below as to how frequently it has upheld its own powers in that respect demonstrate the persistence of the issue. Because of the language of the statute so clearly belies the Tenth Circuit's conclusion, review by this Court is merited.

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[22] The Tenth Circuit referred briefly to *South Carolina Electric, supra,* but that case, like this one, never addressed the specific language or structure of section 10(f) and rested solely on an *ipsi dixit* assertion that "the statute declares the liability." 338 F.2d at 906.

[23] The FERC claims that a literal reading of the third paragraph would leave downstream permittees to pay headwater charges free of investigative costs while downstream licensees, who likewise pay such charges, do pay such costs under the Commission's longstanding practice. This difference between licensees and permittees disappears, however, if the first paragraph of section 10(f) is applied to impose investigative costs only on the upstream party who built the project and receives the payments; licensees and permittees would then be on the same footing, bearing investigative costs only when they benefit from the Commission's investigative labors.

CONCLUSION

For the reasons stated, certiorari should be granted.

Respectfully submitted,

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October 1985

APPENDIX A

PUBLIC SERVICE COMPANY OF COLORADO, Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, Respondent.

COLORADO RIVER WATER CONSERVATION DISTRICT, Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, Respondent.

PUBLIC SERVICE COMPANY OF COLORADO, Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, Respondent.

Nos. 82-2119, 82-2180 and 84-1343.

United States Court of Appeals, Tenth Circuit.

Feb. 15, 1985.

Donald H. Hamburg, Gen. Counsel, Glenwood Springs, Colo. (Robert L. McCarty and Michael N. McCarty of McCarty, Noone & Williams, Washington, D.C., with him on the brief), for petitioner Colorado River Water Conservation Dist.

Andrea Wolfman, Atty., Washington, D.C. (William H. Satterfield, Gen. Counsel, Stephen R. Melton, Acting Gen. Counsel, and Jerome M. Feit, Sol., Washington, D.C., with her on the briefs), for respondent F.E.R.C.

James R. McCotter, Denver, Colo. (Timothy J. Flanagan, Denver, Colo., with him on the briefs) of Kelly, Stansfield & O'Donnell, Denver, Colo., for petitioner Public Service Co. of Colorado.

Before BARRETT, DOYLE and SEYMOUR, Circuit Judges.

BARRETT, Circuit Judge.

The Public Service Company of Colorado (PSC) and the Colorado River Water Conservation District (CRWCD), an intervenor in the administrative proceedings, petition this Court for review of two orders of the Federal Energy Regulatory Commission (FERC). In its "Order Providing For Hearing," Docket No. HB24-63-3, February 10, 1982, 18 FERC ¶ 61,110, FERC determined that PSC was liable to pay the United States for headwater benefits received at PSC's Shoshone Hydroelectric Plant from the United States' Green Mountain Reservoir, pursuant to section 10(f) of the Federal Power Act, 16 U.S.C. § 803(f) (1982). R. Joint Appendix, p. 35/119. In its "Opinion No. 200, Opinion Reversing Initial Decision And Dismissing Request For Rehearing," Docket No. HB-24-63-3-000, December 21, 1983, 25 FERC ¶ 61,399, FERC determined that PSC must reimburse the United States for costs incurred in the headwater benefits investigation that had been undertaken, again pursuant to section 10(f) of the Federal Power Act, 16 U.S.C. § 803(f) (1982). R.Supp. Joint Appendix, p. 186/790. FERC denied the parties' requests for rehearing on both of these orders, R.Supp. Joint Appendix, p. 210/817; R. Joint Appendix, p. 56/162. This Court has jurisdiction to entertain the petition for review of these orders pursuant to section 313 of the Federal Power Act, 16 U.S.C. § 825*l* (1982).

This case involves two installations on the Colorado River system in Western Colorado, and their relationship to each other. The first installation is the Shoshone Hydroelectric Plant, located on the Colorado River itself, on public lands approximately ten miles east of the town of Glenwood Springs, Colorado. It consists of a diversion dam on the river, a gravity tunnel 2⅓ miles long through which the river's water can be

diverted, and a power house where the diverted water under hydrostatic head is used to generate electricity. The Shoshone Plant is a "run-of-the-river" facility, meaning that no water is actually stored there. The Shoshone Plant's operation depends on the direct flow of the river; when the river's flow is less than 1250 cubic feet per second (c.f.s.),[1] the Plant's electrical generating capacity is diminished. No water is actually consumed by the Plant's power production operation. The Shoshone Plant was built pursuant to a right-of-way permit by the Secretary of the Interior in 1903, allowing PSC's predecessor, the Central Colorado Power Company, to enter onto the public lands. The Secretary had allowed entry pursuant to a February 15, 1901 Act, 31 Stat. 790.[2] Since this was before the 1920 passage of the Federal Water Power Act, no license from the Federal Power Commission was necessary to construct the Shoshone Plant.

The Shoshone Plant was completed and began operation in 1909. It has an adjudicated water right of 1250 c.f.s. with a priority date of January 7, 1902, which is the oldest industrial water right on the Colorado River. The only water rights on the river that are senior to the Shoshone Plant's are for agricultural uses in Colorado's Grand Valley, downstream from the Plant.

The second installation involved in this case is Green Mountain Reservior, a water storage facility operated by the Bureau of Reclamation, United States Department of the Interior. It lies on the Blue River, a tributary of the Colorado

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[1] After operating with 1250 c.f.s. for several years, it was discovered in 1929 that Shoshone's gravity tunnel could accommodate 1408 c.f.s. of flow if low-pressure air was injected into the stream of water. A second water right for the additional 158 c.f.s. was obtained, with a priority date of May 15, 1929. This second water right, however, was not adjudicated until after the plans for the Colorado-Big Thompson Project and Green Mountain Reservoir were made. We will, in this opinion, refer only to the Shoshone Plant's original 1250 c.f.s. water right.

[2] The Act of February 15, 1901, codified at 43 U.S.C. § 959, was repealed by section 706(a) of the Federal Land Policy and Management Act of 1976, Pub.L. No. 94-579, 90 Stat. 2793 (1976). Section 701 of the latter Act was a savings provision that kept all valid existing permits and rights-of-way intact. 90 Stat. 2786 (1976).

River, approximately 16 miles southeast of the town of Kremmling, Colorado. The dam and reservior are approximately eight miles above the confluence of the Blue and Colorado Rivers, about one hundred miles upstream from the Shoshone Plant. Green Mountain Reservoir is part of the Colorado-Big Thompson Project, an elaborate system of reclamation facilities constructed to divert water from the Colorado River on Colorado's Western Slope across the Continental Divide onto Colorado's Eastern Slope. The Colorado-Big Thompson Project was authorized and funded by an Act of Congress on August 9, 1937, 50 Stat. 564, 595 (1937). The Act provided that construction would be in accordance with the plan described in Senate Document Number 80, 75th Congress, 1st Session (Senate Document 80). Senate Document 80 describes, among other things, the planned facilities and the manner in which they will be operated. The document provides in pertinent part as follows:

MANNER OF OPERATION OF PROJECT FACILITIES AND AUXILIARY FEATURES

> The construction and operation of this project will change the regimen of the Colorado River below the Granby Reservoir. The project contemplates the maximum conservation and use of the waters of the Colorado River, and involves all of the construction features heretofore listed. In addition thereto certain supplemental construction will be necessary. This will be for the primary purpose of preserving insofar as possible the rights and interests dependent on this water, which exist on both slopes of the Continental Divide in Colorado. The project, therefore, must be operated in such a manner as to most nearly effect the following primary purposes:
>
> 1. To preserve the vested and future rights in irrigation.
>
> 2. To preserve the fishing and recreational facilities and the scenic attractions of Grand Lake, the Colorado River, and the Rocky Mountain National Park.

3. To preserve the present surface elevations of the water in Grand Lake and to prevent a variation in these elevations greater than their normal fluctuation.

4. To so conserve and make use of these waters for irrigation, power, industrial development, and other purposes, as to create the greatest benefits.

5. To maintain conditions of river flow for the benefit of domestic and sanitary uses of this water.

In order to accomplish these purposes the project should be operated by an unprejudiced agency in a fair and efficient manner, equitable to all parties having interests therein, and in conformity with the following particular stipulations:

(a) The Green Mountain Reservoir, or similar facilities, shall be constructed and maintained on the Colorado River above the present site of the diversion dam of the Shoshone power plant, above Glenwood Springs, Colo., with a capacity of 152,000 acre-feet of water, with a reasonable expectancy that it will fill annually. Of said capacity, 52,000 acre-feet of water stored therein shall be available as replacement in western Colorado, of the water which would be usable there if not withheld or diverted by said project; 100,000 acre-feet shall be used for power purposes; and all of said stored waters shall be released under the conditions and limitations hereinafter set forth.

(b) Whenever the flow in the Colorado River at the present site of said Shoshone diversion dam is less than 1,250 cubic feet per second, there shall, upon demand of the authorized irrigation division engineer or other State authority having charge of the distribution of the waters of this stream, be released from said

> reservoir as a part of said 52,000 acre-feet, the amount necessary with other waters available, to fill the vested appropriations of water up to the amount concurrently being diverted or withheld from such vested appropriations by the project for diversion to the eastern slope.
>
> (c) Said 100,000 acre-feet shall be stored primarily for power purposes, and the water released shall be available, without charge, to supply existing irrigation and domestic appropriations of water, including the Grand Valley reclamation project, to supply all losses chargeable in the delivery of said 52,000 acre-feet of water, and for future use for domestic purposes and in the irrigation of lands thereafter to be brought under cultivation in western Colorado. It shall be released within the period from April 15 to October 15 of each year as required to supply a sufficient quantity to maintain the specified flow of 1,250 cubic feet per second of water at the present site of said Shoshone diversion dam, provided this amount is not supplied from the 52,000 acre-feet heretofore specified. Water not required for the above purposes shall also be available for disposal to agencies for the development of the shale oil or other industries.
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> * * * * * *

Senate Document Number 80, 75th Congress, 1st Session, pp. 2-3, R. Joint Appendix, pp. 65/174-66/175; *See also* Senate Document Number 80, Senate Miscellaneous Reports, 75th Congress, 1st Session (1937).

The document can be fairly characterized as a compromise between the respective water interests of Colorado's Eastern and Western Slopes. Under its terms, the Eastern Slope was to get the Alva B. Adams transmountain diversion tunnel (diverting from Grand Lake near the town of Granby, Colorado) and several smaller storage facilities and canals to be built on the Eastern Slope. The Western Slope was to get Green Mountain

Reservoir, which would store 52,000 acre-feet of water during the spring runoff season and then release that stored water into the Colorado River system to replace the water being diverted to the Eastern Slope. Additionally, Green Mountain Reservoir would store 100,000 acre-feet of water for purposes of power production at the site. When this stored water was released, it would be available to appropriators for irrigation and domestic purposes downstream without charge. This method of operation is in contrast with the usual method of operation of water storage facilities, where a specific amount of stored water is delivered to a specific downstream user in accordance with a water delivery contract, and the downstream user pays the storage facility for that amount of stored water when it is delivered.

Green Mountain Reservoir was completed in 1942, at which time several of the appropriators involved commenced water adjudication proceedings in the District Court of Summit County, Colorado, to determine relative priorities for purposes of irrigation (Civil Action No. 1805) and for purposes other than irrigation (Civil Action No. 1806). The United States and the Northern Colorado Water Conservancy District (the Eastern Slope appropriators) joined those proceedings by filing "Statements of Claim." However, the United States later instituted parallel water adjudication proceedings in the United States District Court for the District of Colorado and withdrew from the state court proceedings. The state adjudication eventually reached the Supreme Court of Colorado in *City and County of Denver v. Northern Colorado Water Conservancy District,* 130 Colo. 375, 276 P.2d 992 (1954). The Colorado Supreme Court remanded the case with instructions that the state district court adjudicate the United States' storage and direct flow water rights at Green Mountain Reservoir. By this time, the McCarran Amendment, Pub.L. No. 82-495, § 208(a)-(c), 66 Stat. 549, 560 (1952), codified at 43 U.S.C. § 666 (1982), had been enacted. Accordingly, the United States could be and was served as a party in the state court proceeding. The United States responded by removing the entire case to federal district court where the state docket numbers 1805 and 1806 (the private parties' irrigation and

nonirrigation claims) were reassigned docket numbers 5016 and 5017 and consolidated with the United States' earlier action, Civil Action No. 2782. This proceeding became known as the "Consolidated Cases."

The parties eventually settled the case by stipulation in 1955. The federal district court incorporated the settlement agreement into its "Findings of Fact, Conclusions of Law and Final Decree," entered on October 12, 1955. R. Joint Appendix, p. 95/204. The decree issued by the court became known as the "Blue River Decree," under which Green Mountain Reservoir was awarded a direct flow water right of 1726 c.f.s. and a storage water right of 154,645 acre-feet, both with a priority date of August 1, 1935. The Blue River Decree also incorporated Senate Document 80 by reference and repeated the language of that document describing the manner in which the Colorado-Big Thompson facilities, including Green Mountain Reservoir, were to be operated. The history of this litigation is also discussed in *United States v. Northern Colorado Water Conservancy District*, 608 F.2d 422 (10th Cir.1979), and in *United States v. Martin*, 267 F.2d 764 (10th Cir.1959).

The terms of the Blue River Decree were approved by Congress in 1956 in the Colorado River Storage Project Act, Pub.L. No. 84-485, 70 Stat. 105, 110 (1956), codified at 43 U.S.C. 620*j* (1982). The effect of this Congressional approval is that the terms of Senate Document 80, as incorporated in the Blue River Decree, have the force of a statute and still control the manner in which Green Mountain Reservoir is to be operated.

We now discuss the statutory authority upon which FERC based its assessment of headwater benefits against PSC's Shoshone Plant. In 1920, Congress enacted the Federal Water Power Act, Pub.L. No. 66-280, 41 Stat. 1063 (1920), now codified at 16 U.S.C. 791*a et seq.* (1982). Prior to the passage of this Act, federal control over water power was characterized by duplicative and overlapping jurisdiction exercised by the Department of War, the Department of Agriculture, and the Department of the Interior. *Monongahela Power Co. v. Alexander*, 507 F.Supp. 385, 387 (D.D.C.1980). The Federal Water

Power Act gave exclusive licensing authority for hydroelectric projects on the navigable waters of the United States to a newly created federal agency, the Federal Power Commission (FPC).[3] In *First Iowa Hydroelectric Cooperative v. Federal Power Commission*, 328 U.S. 152, 66 S.Ct. 906, 90 L.Ed. 1143 (1946), the Supreme Court examined the purposes of the Federal Water Power Act and found that:

> It was the outgrowth of a widely supported effort of the conservationists to secure enactment of a complete scheme of national regulation which would promote the comprehensive development of the water resources of the Nation, insofar as it was within the reach of the federal power to do so, instead of the piecemeal, restrictive, negative approach of the River and Harbor Acts and other federal laws previously enacted. *Id.* at 180, 66 S.Ct. at 919.

In section 10(f) of the Federal Water Power Act, authority was given to the FPC to assess licensees of downstream hydroelectric facilities for headwater benefits created by the construction of other licensed projects upstream. The term "headwater benefits" refers to the situation in which an upstream reservoir, through a program of water storage and subsequent controlled release, alters the natural flow of a river in such a way as to allow a downstream hydroelectric facility to generate more electric power than would otherwise be possible. This is accomplished primarily by augmenting the natural flow of the river with released storage water during seasons when the natural flow would otherwise not be sufficient to allow the downstream facility to operate at full capacity. The concept of assessing downstream licensees for headwater benefits was described in detail in an opinion by the FPC:

> Congress in the enactment of § 10(f) of the Power Act intended to encourage the orderly and comprehensive development of watersheds having power value through financial contributions by lower

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[3] The duties and functions of the FPC were assumed by the Federal Energy Regulatory Commission (FERC) in 1977. See Dept. of Energy Organization Act, Pub.L. No. 95-91, 91 Stat. 565 (1977).

> licensees who benefit from upstream improvements where upper storage reservoirs or other headwater improvements will result in a more nearly uniform or desirable flow than is available under natural conditions. The section contemplates that where lower licensees and other power developers are benefited they shall participate in the financial burden incident to the orderly and systematic construction of power and storage facilities of a river basin. Such financial support of headwater improvements by downstream beneficiaries extends the feasible limits of such improvements in the common interest. The act imposes upon the Commission the task of equitably apportioning the annual charges for interest, maintenance and depreciation of the upper headwater improvements so that each beneficiary may contribute its just share for the construction of such upper improvements of common benefit. *Re Southern California Edison Co., Ltd.*, 1 FPC 567, 574 (1939).

In the Public Utility Act of 1935, Pub.L. No. 74-333, Ch. 687, 49 Stat. 803 (1935), Congress changed the name of the Federal Water Power Act to the Federal Power Act, amended section 10(f) so that both licensees and pre-1920 federal permittees could be assessed headwater benefits, *Grand River Dam Authority v. Federal Power Commission*, 246 F.2d 453, 455 (10th Cir.1957), and added a second part to the Act dealing with the regulation of certain electric utility companies. Section 10(f) now reads as follows:

> (f) That whenever any licensee hereunder is directly benefited by the construction work of another licensee, a permittee, or of the United States of a storage reservoir or other headwater improvement, the Commission shall require as a condition of the license that the licensee so benefited shall reimburse the owner of such reservoir or other improvements for such part of the annual charges for interest, maintenance, and depreciation thereon as the Commission may deem equitable. The proportion of such

charges to be paid by any licensee shall be determined by the Commission. The licensees or permittees affected shall pay to the United States the cost of making such determination as fixed by the Commission.

Whenever such reservoir or other improvement is constructed by the United States the Commission shall assess similar charges against any licensee directly benefited thereby, and any amount so assessed shall be paid into the Treasury of the United States, to be reserved and appropriated as a part of the special fund for headwater improvements as provided in section 810 of this title.

Whenever any power project not under license is benefited by the construction work of a licensee or permittee, the United States or any agency thereof, the Commission, after notice to the owner or owners of such unlicensed project, shall determine and fix a reasonable and equitable annual charge to be paid to the licensee or permittee on account of such benefits, or to the United States if it be the owner of such headwater improvement. 16 U.S.C. § 803(f) (1982).

With this statutory and historical background, we now consider the issues that have been raised by the challenge of the PSC and the CRWCD to FERC's headwater benefits assessment against the Shoshone Plant. The issues are as follows:

1. Is FERC without jurisdiction to assess headwater benefits against the Shoshone Plant because the Plant operates under a pre-1920 permit?

2. Is the assessment of headwater benefits against the Shoshone Plant in derogation of its water rights under Colorado law and therefore a taking without just compensation in violation of the Fifth Amendment to the United States Constitution?

3. Is the assessment of headwater benefits against the Shoshone Plant precluded by the terms of Senate Document 80?

4. If the assessment of headwater benefits against the Shoshone Plant was proper and in accordance with law, is PSC also obligated to reimburse FERC under section 10(f) of the Federal Power Act for costs incurred in making this particular headwater benefits determination?

I.

We first consider whether FERC has jurisdiction to assess headwater benefits against PSC's Shoshone Plant. PSC contends that FERC has no such jurisdiction, for the reason that the Plant holds no Federal Power Act license but rather operates under a 1903 permit. PSC relies on the case of *United States v. Colorado Power Co.*, 240 Fed. 217 (D.Colo.1916), for the proposition that PSC's rights were completely fixed and determined by the Act of February 15, 1901 alone. The court in that case did make such a statement, but further stated that Colorado Power Company (PSC's predecessor in interest) never had more than a revocable permit. The court held that the Secretary of the Interior could lawfully assess the Company a charge based on the amount of electricity it produced. The Act, said the court, did not specify burdens that the Secretary was or was not empowered to impose for the use of the permit, and in this instance the Secretary's charges were within his power. We note that the Act, as originally enacted, referred only to regulation by the Secretary of the Interior:

> "... That the Secretary of the Interior be, and hereby is, authorized and empowered, under general regulations to be fixed by him, to permit the use of rights of way through the public lands...." 31 Stat. 790 (1901).

It would be inappropriate to interpret this language as being continuously exclusive in nature, however, because it was written before Congress created the FPC and vested comprehensive jurisdiction over existing and planned hydroelectric projects in the new agency. In 1935, Congress gave the FPC jurisdiction to make headwater benefits assessments against pre-1920 permittees by adding the following language to section 10(f): "Whenever any power project *not under license* is

benefitted . . . the Commission . . . shall determine and fix a reasonable and equitable annual charge to be paid. . . ." Pub.L. No. 74-333, § 10, 49 Stat. 843 (1935). The pertinent legislative history shows that it was Congress' intent to bring existing hydroelectric plants operating under pre-1920 permits under FPC jurisdiction, thereby removing the inequities involved in subjecting post-1920 licensees and not pre-1920 permittees to these assessments. *See* H.R.Rep. No. 1318, 7th Cong. 1st Sess. at 25 (1935); S.Rep. No. 621, 74th Cong. 1st Sess. at 45 (1935); *accord, Grand River Dam Authority v. Federal Power Commission, supra.* In enacting the 1935 amendments, Congress further accomplished the transfer of jurisdiction over hydroelectric projects from the Department of the Interior (along with the Department of War and the Department of Agriculture) to the FPC. The Act of February 15, 1901, although it mentions only the Department of the Interior, does not forbid Congress from subsequently transferring jurisdiction over the permittee from one agency to another; to read into the 1901 Act a bar against the subsequent transfer of regulatory jurisdiction would be to frustrate the intent of Congress when it enacted the 1935 amendments to the Federal Water Power Act, and this we cannot do.

II.

PSC contends that it has, under the State of Colorado's prior appropriation doctrine, a vested property right to divert and apply to beneficial use, without charge, its full appropriation of 1250 c.f.s. whenever the river contains that amount of water and its water right is in priority. Consequently, FERC's assessment of headwater benefits against PSC's Shoshone Plant when the Plant has done no more than exercise its rights under Colorado law, is, according to PSC, an unconstitutional taking of property without compensation. We disagree. PSC's argument fails to take into account the differences recognized in the prior appropriation doctrine between water that comprises a stream's "natural flow" and storage water. *See* Hutchins, 1 *Water Rights Laws In The Nineteen Western States,* p. 603 (1971).

As a starting proposition, Colorado's Constitution guarantees its citizens that "The right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied. Priority of appropriation shall give the better right as between those using the water for the same purpose. . . ." Colo. Const. art. XVI, § 6. The Colorado Constitution thus confirmed that the doctrine of prior appropriation was the operative water law in the state, rather than the riparian doctrine that had become established in the eastern states. *See Coffin v. Left Hand Ditch Company,* 6 Colo. 443 (1882). Under Colorado's prior appropriation doctrine, a water right is indeed a vested property right. *Ackerman v. City of Walsenburg,* 171 Colo. 304, 467 P.2d 267, 270 (1970); *Green v. Chaffee Ditch Company,* 150 Colo. 91, 371 P.2d 775, 783 (1962); *Archuleta v. Boulder & Weld County Ditch Co.,* 118 Colo. 43, 192 P.2d 891, 894 (1948). An interference with or taking of that right requires compensation to the owner. *Farmers Irrigation Co. v. Game & Fish Comm'n,* 149 Colo. 318, 369 P.2d 557, 559-60 (1962); *Strickler v. City of Colorado Springs,* 16 Colo. 61, 26 P. 313, 317 (1891).

In general, the storage of water for future uses is considered a beneficial use. Clark 5 *Waters and Water Rights,* § 408.3, p. 82 (1972). Delivery of storage water to its place of use can be accomplished by either of two methods: (1) delivery through an artificial ditch or pipe, or (2) delivery through a natural stream channel. Our focus is on the second method, delivery through a natural stream channel, which generally has been recognized as a valid delivery method in the prior appropriation states. "It is elementary that a stream may be used as a part of the ditch system and that the person adding the water has the right to redivert it from the stream at the place it is needed for use." Trelease, *Reclamation Water Rights,* 32 Rocky Mtn. L.Rev. 464, 471 (1960). *See also United States v. Haga,* 276 Fed. 41, 44 (D.Idaho 1921). The statutes of the State of Colorado specifically provide for this method of storage and delivery. Title 37, Article 87 of the Colorado Statutes is entitled "Reservoirs." Section 37-87-101 grants the right to store water, and allows any post-April 18, 1935 water storage right to prevail over other rights of later

priority.[4] Colo.Rev. Stat. § 37-87-101 (Supp.1983). Section 37-87-102 specifically allows the owner of a reservoir to conduct storage water into natural streams for rediversion and use downstream. Colo.Rev.Stat. § 37-87-102 (1973). Section 37-87-103 provides that reservoir owners who avail themselves of section 37-87-102 shall give notice to the local irrigation division engineer when a release of storage water into a natural stream is planned. This is so the responsible water officials can measure the physical parameters of the release (time of release, amount of water released, rate of release, distance between point of release and point of rediversion, etc.), calculate delivery losses, and thereby protect the interests of both the reservoir owner and the other appropriators on the stream. Colo.Rev.Stat. § 37-87-103 (1973). The reservoir owner who uses a natural stream to deliver stored water therefore does not abandon or lose control over the stored water when he places it in the stream for delivery, rediversion and beneficial use downstream. *Sorenson v. Norell,* 24 Colo.App. 470, 135 P. 119, 120 (1913); *Ft. Morgan Reservoir and Irrigation Co. v. McCune,* 71 Colo. 256, 206 P. 393, 395 (1922). *See generally Herriman Irrigation Co. v. Keel,* 25 Utah 96, 69 P. 719, 726 (1902).

If the reservoir owner does not relinquish control of his "batch" of storage water by sending it down a natural stream channel, it follows that other appropriators on the stream, even though they may be senior to the reservoir owner in priority, do not gain the right to divert that "batch" of storage water as it passes their headgates, or to make use of the storage water in any way. Their rights to divert water for beneficial use apply only to the stream's "natural flow"; they do not apply to storage

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[4] This section was amended by the Colorado legislature on April 18, 1935, 1935 Colo.Sess. Laws, p. 661, § 1, in response to an April 15, 1935, decision by the Colorado Supreme Court interpreting the original language of this statute to subordinate storage rights to domestic and irrigation rights. The Court reconsidered and reversed its decision on February 3, 1936. *People ex rel. Park Reservoir Co. v. Hinderlider,* 98 Colo. 505, 57 P.2d 894 (1936). The priority of the individual water right now controls in Colorado, whether that right is for storage or direct flow. *See* Hutchins, 1 *Water Rights Laws In The Nineteen Western States,* p. 355.

water being delivered down the stream. That water has a "label" on it and is no longer public property.

The situation where a reservoir owner delivers water downstream is in contrast to the situation where storage water escapes from a reservoir inadvertently through seepage. In the latter situation, the Colorado Supreme Court has held that such seepage is merely waste, in the nature of return flow; when and if it returns to the stream it is subject to use by those appropriators with senior priority, and neither the reservoir owner nor the person who has conveyed the water into the stream through a drainage channel has any claim to it. *Comstock v. Ramsay,* 55 Colo. 244, 133 P. 1107 (1913); *accord, Durkee Ditch Co. v. Means,* 63 Colo. 6, 164 P. 503 (1917); *Rio Grande Reservoir & Ditch Co. v. Wagon Wheel Gap Improvement Co.,* 68 Colo. 437, 191 P. 129 (1920). PSC relies heavily on *Comstock v. Ramsay, supra,* to support its claim that the United States loses all control over storage water from Green Mountain Reservoir's 100,000 acre-foot pool once that water is released from the dam. The *Comstock* case, however, is inapposite, because the storage water in question here has not been abandoned through inadvertent seepage; rather it is released, pursuant to the terms of Senate Document 80, at a controlled rate for the specific benefit of the domestic and irrigation appropriators downstream on the Colorado River.

During those times of the year when the flow of the Colorado River (even with all upstream appropriators junior to the Shoshone Plant shut down) would be less than 1250 c.f.s. were it not for the release of storage water from Green Mountain Reservoir, the Shoshone Plant, by virtue of its position on the Colorado River between Green Mountain Reservoir and the domestic and irrigation appropriators downstream in the Grand Valley, is an incidental beneficiary of the Green Mountain storage water release program. Becasue the owner of Green Mountain Reservoir has not objected to the Shoshone Plant's nonconsumptive use of Green Mountain's storage water while it is being delivered to the Grand Valley, the Shoshone Plant has been able to generate more electricity than it otherwise would have. To this extent the Shoshone Plant has been getting more than it is entitled to under

Colorado's prior appropriation doctrine. Thus, there is no unconstitutional taking of property without compensation when the Shoshone Plant is assessed by FERC for the benefits it has been receiving as a result of the augmented stream flow caused by the release of storage water at Green Mountain Reservoir.

III.

We next consider whether FERC is precluded by the terms of Senate Document 80 from assessing headwater benefits against the Shoshone Plant. PSC contends in this regard that Senate Document 80 explicitly provides that storage water from the 100,000 acre-foot pool at green Mountain Reservoir is to be made available to the Shoshone Plant "without charge." Senate Document 80, contends PSC, guarantees the Shoshone Plant a minimum flow of 1250 c.f.s. between April 15 and October 15 of each year, without charge, and that this guarantee was the *quid pro quo* for the Western Slope water interests given in return for their permission to allow trans-mountain diversion of water to the Eastern Slope. Senate Document 80 has the force of a statute, and PSC contends that the document is irreconcilable with section 10(f) of the Federal Power Act, inasmuch as one statute requires the assessment of headwater benefits and the other statute prohibits such assessment. In such a case of statutory conflict, traditional rules of statutory construction come into play; and here, contends PSC, Senate Document 80 must prevail over section 10(f) because it is both the more specific statute and the later enacted statute.

FERC concedes that Senate Document 80 provides that Green Mountain storage water is to be made available at the Shoshone Plant without charge, but takes the position that a headwater benefits assessment under section 10(f) is based only on electricity generated from the water and has nothing to do with PSC's water rights at the Shoshone Plant. FERC contends that there is nothing inconsistent in recognizing PSC's "proprietary" interest in the water and in charging PSC for the use it makes of that water, namely the generation of electricity. Inasmuch as the two statutes deal with entirely different subjects, argues FERC, they are not irreconcilable and both

should be given full effect. In essence, FERC's position is that, while PSC gets the water without charge, PSC can still be charged for the electricity generated from that water.

We must respectfully disagree with the positions taken by both parties. At the outset, we emphasize that we reject FERC's distinction between an appropriator's "proprietary" right to water and the appropriator's use of that water. Under the prior appropriation doctrine, a water right is a usufructuary right, and is in no sense a right of ownership of the corpus of the water itself. *See, e.g.,* Hutchins, 1 *Water Rights Laws In The Nineteen Western States,* p. 151. Although the early Colorado cases have not been very clear on this point, it appears that they follow the general prior appropriation doctrine and consider a water right to be usufructuary in nature. *Nichols v. McIntosh,* 19 Colo. 22, 34 P. 278, 280 (1893); *Wyatt v. Larimer & Weld Irrigation Co.,* 1 Colo.App. 480, 29 P. 906, 910 (1892), *rev'd on other grounds,* 18 Colo. 298, 33 P. 144 (1893); *Wheeler v. Northern Colo. Irrigation Co.,* 10 Colo. 582, 17 P. 487, 489-90 (1888). Thus, the "proprietary" right of PSC that FERC refers to cannot be distinguished from the use made of the water, in this case the generation of electricity. FERC is forbidden by section 27 of the Federal Power Act, 16 U.S.C. § 821 (1982), from affecting or interfering with state law relating to the control, appropriation, use, or distribution of water. If FERC were allowed to assess charges for the use of water to which PSC has a vested right, it would be accomplishing indirectly what it is forbidden to do directly. FERC's position is therefore rejected.

We likewise must reject PSC's position regarding the interpretation of Senate Document 80. We begin our analysis with the cardinal rule of construction that repeal of a statute by implication is disfavored. "The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v. Mancari,* 417 U.S. 535, 551, 94 S.Ct. 2474, 2483, 41 L.Ed.2d 290 (1974). *See, e.g., Tennessee Valley Authority v. Hill,* 437 U.S. 153, 189-190, 98 S.Ct. 2279, 2299-2300, 57 L.Ed.2d 117 (1978); *United*

States v. Borden, 308 U.S. 188, 198, 60 S.Ct. 182, 188, 84 L.Ed. 181 (1939); *Yellowfish v. City of Stillwater,* 691 F.2d 926, 928 (10th Cir. 1982), *cert. denied,* 461 U.S. 927, 103 S.Ct. 2087, 77 L.Ed.2d 298 (1983); *Watts v. Hadden,* 651 F.2d 1354, 1381-82 (10th Cir. 1981). Upon close examination of the language of Senate Document 80, we find no definite expression of intent to provide storage water from Green Mountain's 100,000 acre-foot pool to the Shoshone Plant without charge. In section (c) of the document, water from the 100,000 acre-foot pool is to be provided, without charge, for the following purposes: "[1] to supply existing irrigation and [2] domestic appropriations of water, [3] including the Grand Valley reclamation project, [4] to supply all losses chargeable in the delivery of said 52,000 acre-feet of water, and [5] for future use for domestic purposes and [6] in the irrigation of lands thereafter to be brought under cultivation in Western Colorado." Senate Document 80, *supra* at 3. The Shoshone Plant does not appear on this list. Accordingly, we are supported by the maxim *expressio unius est exclusio alterius* (the expression in a statute of certain powers, exceptions, designated persons or things, etc., implies the exclusion of others not mentioned) in our conclusion that there was never a specific intention that the Shoshone Plant was to receive this storage water without charge. *United States v. Jones,* 567 F.2d 965, 967 (10th Cir. 1977); *see also* Sutherland, 2A *Statutory Construction,* § 47.23, p. 194. Section (c) further provides that storage water from the 100,000 acre-foot pool is to be released between April 15 and October 15 so as to provide 1,250 c.f.s. at the Shoshone Plant; however, we consider this to be an expression only of the rate of release, not an indication that the Shoshone Plant was to receive the water without charge. We do agree with PSC that section (c) is silent with regard to headwater benefits assessments or any other charges against the Shoshone Plant, but we believe that such silence does not create the kind of patent repugnancy upon which a repeal by implication can be supported. We base our findings here on the plain language of the document, and note in passing that the legislative history of the appropriations act of 1937 which funded Green Mountain Reservoir, 50 Stat. 564, 595 (1937), is silent as to the meaning or intent of Senate

Document 80. *See* H.Rep. 786, S.Rep. 817, Conf.Rep. 1178, 75th Cong., 1st Sess. (1937); House Debates, 81 Cong.Rec. 4353, 4508, 4512-4573, 4578-4613, 4671-4714, 4796-4815, 4849-4877; Senate Debates, 81 Cong.Rec. 6376-87, 6389, 6393. With no expression of intent in either Senate Document 80 or the legislative history that the Shoshone Plant would receive the storage water without charge, we find no preclusion or bar to the assessment of headwater benefits under section 10(f) of the Federal Power Act.

Document 80. *See* H.Rep. 786, S.Rep. 817, Conf.Rep. 1178, 75th Cong., 1st Sess. (1937); House Debates, 81 Cong.Rec. 4353, 4508, 4512-4573, 4578-4613, 4671-4714, 4796-4815, 4849-4877; Senate Debates, 81 Cong.Rec. 6376-87, 6389, 6393. With no expression of intent in either Senate Document 80 or the legislative history that the Shoshone Plant would receive the storage water without charge, we find no preclusion or bar to the assessment of headwater benefits under section 10(f) of the Federal Power Act.

IV.

We now consider whether PSC is obligated under section 10(f) of the Federal Power Act to reimburse FERC for costs incurred in investigating and determining the amount of headwater benefits due. The operative language from section 10(f) is the last sentence of the first paragraph: "The licensees or permittees affected shall pay to the United States the cost of making such determination as fixed by the Commission." 16 U.S.C. § 803(f) (1982).

PSC contends that this language is intended to include only the upstream licensee or permittee, the party who confers the headwater benefits and receives payment for them. We find PSC's arguments in this regard unpersuasive. We choose to follow *South Carolina Electric & Gas Company v. Federal Power Commission,* 338 F.2d 898 (4th Cir.1964), as well as the long-standing position of the Federal Power Commission, *Virginia Electric Power Co.,* 22 FERC ¶ 61,351 (1983); *Alabama Power Co.,* 13 FPC 1317 (1954); *Southern California Edison Co.,* 5 FPC 648, 649 (1939), and hold that under section 10(f) investigative costs are properly split between both the upstream and the downstream projects, except when the upstream project is owned by the United States. Since costs may not be assessed against the United States under section 10(f), *Grand River Dam Authority v. Federal Power Commission, supra,* the downstream project must pay all of the investigative costs when the upstream project is federal.

Both PSC and FERC have indicated in their briefs that they have reached an agreement regarding the proper amount of the headwater benefits assessment, that agreement to be contingent on the outcome of this appeal. We have not been provided with any information on the manner in which this proposed assessment was calculated, however. FERC's original order of February 10, 1983, 18 FERC ¶ 61,110, assessing headwater benefits, reached the correct result, but was based on incorrect legal grounds. We do not know how this may have affected the headwater benefits calculations, and we do not wish that PSC be bound to an agreement that may have been based on faulty legal assumptions. We therefore set aside FERC's order of February 10, 1983, and remand for proceedings to assess and calculate headwater benefits, consistent with this opinion.

FERC's order of December 21, 1983, 25 FERC ¶ 61,399, finding PSC liable to reimburse FERC for its investigative costs, is affirmed, but the cause is otherwise remanded for further proceedings.

APPENDIX B

Public Service Company of Colorado, Docket No. HB24-63-3
Order Providing for Hearing
(Issued February 10, 1982)

Before Commissioners: C. M. Butler III, Chairman; Georgiana Sheldon, J. David Hughes and A. G. Sousa.

On December 11, 1979, notice was issued of a proposed determination of headwater benefits payments made pursuant to Section 10(f) of the Federal Power Act (Act), 16 U.S.C. § 803(f), owed by the Public Service Company of Colorado (Public Service) for the benefits its Shoshone Hydroelectric Plant receives from the federal Green Mountain Reservoir in the upper Colorado River Basin.[1] The staff prepared a report for the period of November 16, 1942, through December 31, 1970. The report has been circulated for comment. In addition, two conferences were held with Public Service and interested groups.[2] Based on the report and subsequent comments, the proposed payments were determined to be $433,465 for the benefits and $50,311 for the costs of the investigation.

In response to the notice, Public Service filed comments objecting to the assessment of headwater benefits. Additionally, the Colorado River Water Conservation District (CRWCD) has been granted intervention in this proceeding. CRWCD's petition to intervene was generally in support of the views expressed by Public Service.

Public Service raises five issues that it believes prevents the Commission from assessing headwater benefits in this situation. These issues are: (1) the effect of the pre-1920 construction of

[1] Green Mountain Reservoir was constructed in 1942 on the Blue River 15 miles above its confluence with the Colorado River in Summit County, Colorado. It is operated by the United States Department of the Interior, Bureau of Reclamation. The purpose of the reservoir is to replace water, required by prior rights along the Colorado River, that is diverted to the eastern slope of Colorado by the Colorado-Big Thompson Project.

[2] Based on the comments, staff revised the figures in the draft report to take into account the effect of net evaporation in Green Mountain Reservoir and intervening irrigation diversions to certain holders of junior water rights.

the Shoshone Plant; (2) the interpretation of Senate Document No. 80, 75th Cong., 1st Sess. (1937); (3) the interpretation of the stipulation and decree in *U.S. v. Northern Colorado Water Conservancy District, et al.*, Civil Nos. 5016 and 5017, unreported (1955) ("Blue River Decree"); (4) the applicability of Colorado water law; and (5) the alleged violation of the Fifth Amendment of the Constitution in assessing headwater benefits payments. In this order we will dispose of these issues.

In the alternative, Public Service requests that an evidentiary hearing be held, particularly on the methodology Staff used in making its headwater benefits assessment. By this order we grant the request for hearing.

Pre-1920 Construction

The Shoshone Plant was constructed around 1909 on the Colorado River in Garfield County, Colorado.[3] Public Service argues that, because this pre-1920 construction exempts it from the Commission's licensing jurisdiction, it also exempts Public Service from assessments pursuant to Section 10(f) of the Act. The law is however settled that headwater benefits assessments are not affected by the date of project construction. Section 10(f) provides for the assessment of headwater benefits for all non-federal hydroelectric plants, whether or not under license or permit, that benefit from federal construction. The date of the hydroelectric plant's construction or of the federal construction is not determinative of the ability to assess headwater benefits. *E.g., South Carolina Electric and Gas Co. v. FPC*, 338 F.2d 898 (4th Cir. 1964).

Senate Document No. 80 and the Blue River Decree

Public Service states that Senate Document No. 80 and the Blue River Decree, which govern the operation and maintenance of Green Mountain Reservoir, set forth the rights and

[3] Public Service does not hold a license for the continued operation and maintenance of the Shoshone Plant. Public Service claims to possess a valid, pre-1920 federal right-of-way for its occupancy of lands of the United States.

obligations of the parties, including Public Service and the United States. Based on these documents,[4] Public Service argues that the United States has bargained away any Section 10(f) assessment.

Senate Document No. 80 is a report prepared by the Bureau of Reclamation setting forth the plan of development of the Colorado-Big Thompson Project, including the operation of and release of water from the Green Mountain Reservoir. The report states that Green Mountain has a usable storage capacity of 152,000 acre-feet, of which 52,000 acre-feet are available for replacement water [5] and 100,000 acre-feet are to be used for power purposes.[6]

The Blue River Decree settled who holds what water rights and determined their priority dates. The Decree repeats the above-described terms of Senate Document No. 80.

The Commission is not assessing any headwater benefits charges for the 52,000 acre-feet allocated as replacement water. The Senate Document No. 80 provides that the water from the 100,000 acre-feet designated for power purposes shall be available free of charge to existing and future irrigation and domestic appropriators of water, and to supply losses chargeable in delivery of the 52,000 acre-feet. The water not required for the above purposes is available for disposal.

1. CRWCD states that a determination of headwater benefits could involve interpreting the Senate Document and the Blue River Decree. CRWCD argues that the U.S. District Court in Colorado has exclusive jurisdiction to effectuate the

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[4] Public Service's citation to *United States v. Northern Colorado Water Conservancy District*, 608 F.2d 422 (10th Cir. 1979), which involves an issue unrelated to the matter before us, adds nothing to Public Service's basic arguments. The decision merely repeats the description of the project and the documents which govern it.

[5] The actual constructed capacity of Green Mountain is 154,645 acre-feet, with 54,645 acre-feet to be allocated as replacement for the water diverted to the eastern slope by the Colorado-Big Thompson Project. *U.S. v. Northern Colorado Water Conservancy District, supra*, 608 F.2d 422, 425.

[6] There are power facilities associated with the Green Mountain Reservoir.

objectives of the Blue River Decree and therefore that the Commission is without jurisdiction to interpret the documents.

CRWCD misinterprets the nature of a headwater benefits assessment. The assessment determines what power benefits have been received by downstream hydroelectric projects from upstream federal construction. It in no way affects water rights. The Commission's exclusive jurisdiction to determine headwater benefits does not therefore conflict with the district court's jurisdiction for the purpose of effectuating the objectives of the Decree.

2. Public Service argues that the United States bargained away headwater benefits payments in the Blue River Decree and related litigation. However, there was no explicit waiver of headwater benefits payments in any of the documents governing the construction and operation of Green Mountain, nor is there any compelling argument that a waiver of headwater benefits payments should be inferred from these documents.[7]

Section 10(f) of the Federal Power Act provides that beneficiaries shall pay that portion of the annual cost for interest, maintenance and depreciation of federal projects that the Commission determines to be equitable. In 1935, Section 10(f) of the Federal Power Act was amended to give the Commission exclusive authority to collect from non-licensees charges for all headwater benefits received from upstream federal developments. Consequenently, there can be no binding contract regarding headwater benefits between Public Service and the Secretary of Interior without Commission approval. The headwater benefits study for the Upper Colorado River is based on the benefits received at the Shoshone Plant from the upstream federal construction. The charges are calculated in the terms of an equitable portion of certain annual costs of the headwater improvements; however, headwater benefits assessments continue to be made for a project even

[7] The Supreme Court has stated in similar situations that a legislative grant must be strictly construed in favor of the United States. *Broad River Power Co. v. South Carolina*, 281 U.S. 537, 543 (1930). In addition, any doubt or ambiguity must be resolved in favor of the government. *Southern Pacific Co. v. U.S.*, 307 U.S. 393, 401 (1939).

after it has been fully depreciated, because these assessments include a portion of the annual maintenance costs.

The Blue River Decree and the Senate Document state that the cost of construction, operation, and maintenance of the Green Mountain Reservoir will be paid from power and water use contract revenues.[8] This or similar language is contained in the authorizations for other reclamation projects for which the Commission assesses headwater benefits.[9] The cost allocations for power have been made for Green Mountain Reservoir. In accordance with reclamation laws, payments for headwater benefits from reclamation projects in this river basin are to be deposited in the Reclamation Fund, where they would be used to reduce the power rates for the Pick-Sloan Missouri River Basin Projects.

In light of the above discussion, we find that the Blue River Decree, Senate Document, and subsequent litigation do not bar the assessment of headwater benefits received at the Shoshone Plant from the Green Mountain Reservoir.

Colorado Water Law

Public Service argues that Colorado water law does not give the United States any right to assess charges against downstream appropriators, because the upstream appropriator

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[8] The documents state that the 52,000 acre-feet of replacement storage will be paid for by the water users in northeastern Colorado (recipients of the transmountain diversion of the Colorado-Big Thompson Project). The 100,000 acre-feet of power storage will be paid for out of power revenues. In addition, the report states that the cost of construction, operation, and maintenance shall be paid from revenues collected from the project as may be provided in contracts between the Secretary of the Interior and the beneficiaries of the project in eastern Colorado or any other contracting party.

[9] The reclamation laws provide for repayment of reimbursable costs of reclamation projects. These laws provide that net revenues from the sale of power shall be used to pay the construction costs allocated to power. 43 U.S.C. § 392a. The Secretary of the Interior is instructed to sell power developed at reclamation projects at a rate sufficient to cover an appropriate share of annual operation and maintenance costs. 43 U.S.C. § 485h(c). Also costs attributable to irrigation operations are paid by the irrigators. 43 U.S.C. § 461.

(here, the United States) has no proprietary interest in any returned water.[10] Public Service also argues that the United States has no water rights by virtue of storage at Green Mountain.

A headwater benefits assessment is not made on the basis of any proprietary interest in the water, but rather for benefits received from the controlled releases from the federal reservoir.[11] The issue is therefore not water rights, but whether Green Mountain through regulated or controlled flow releases provides benefits in the form of energy gains at the Shoshone Plant that Shoshone would not have had if Green Mountain were not in existence. Consequently, Colorado water law does not prevent the assessment of headwater benefits for the Shoshone Plant.

Fifth Amendment of the Constitution

Public Service argues that the assessment of headwater benefits violates the Fifth Amendment of the Constitution. The constitutionality of the Federal Power Act was long ago confirmed. *U.S. v. Appalachian Power Co.*, 311 U.S. 377 (1940). More specifically, the courts have upheld the Commission's authority to assess headwater benefits. *E.g., South Carolina Electric and Gas Co. v. FPC, supra; Virginia Electric and Power Co. v. FPC*, 351 F.2d 408 (4th Cir. 1965). Public Service's constitutional argument is therefore without merit.

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[10] Returned water is defined as water that is placed, or seeps back, into a river after appropriation and use. The principle has been established in Colorado that return waters from a diversion under an appropriative right are a part of the stream flow from the time that the water escapes from the premises or works of the appropriator, provided the water would ultimately return to the stream system from which originally diverted if it was not artifically intercepted. II W. A. Hutchins, Water Rights Laws in the Nineteen Western States, at page 581 (1974).

[11] Generally, regulated flow releases provide a more dependable stream flow by storing water during peak run-off periods to be released during drier months.

Interest

The assessment of moneys to be paid by Public Service is exclusive of any interest payment. The authority to impose interest on funds to be collected under the Federal Power Act is firmly established. *Montana Power Co. v. FPC*, 459 F.2d 863 (D.C. Cir. 1972); *Columbia River Basin, Headwater Benefits Investigation*, 33 FPC 1290 (1965). We believe that interest should be assessed from the date that Public Service was notified of the proposed determination; that is, December 11, 1979.[12] We believe that a reasonable interest rate would be the rate calculated on refunds of that portion of suspended electric rates which are ultimately determined not to be justified.[13] See 18 C.F.R. § 35.19a (1981).

Further Proceedings

In light of the factual disputes, particularly concerning staff's methodology and the factors that Public Service claims should have been considered, we find that this matter would be best resolved in an evidentiary hearing. The hearing should focus on the factual bases for and methodology employed in staff's proposed assessment, as contained in its investigation report and the revision thereto. The hearing should also address the proper method for calculating the headwater benefits that Public Service has received since December 31, 1970 and will receive in the future.

The Commission orders:

(A) Pursuant to the provisions of the Federal Power Act, particularly 10(f), 10(g), 308, and 309, and the Commission's Rules of Practice and Procedure, a hearing shall be held to

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[12] If Public Service pays the assessment within 60 days of the date of this order, no interest will be assessed. Failure to pay will invoke the assessment of interest, but not the penalty provisions of the regulations since Public Service has previously requested a hearing. Section 11.31 of the Commission's Regulations, 18 C.F.R. § 11.31 (1981).

[13] The appropriate forum for any issue which may be raised with respect to the applicable interest rate is the hearing ordered herein.

determine the liability of the Public Service Company of Colorado for headwater benefits received by its Shoshone Plant from the federal Green Mountain Reservoir.

(B) A Presiding Administrative Law Judge, to be designated by the Chief Administrative Law Judge, shall preside at the hearing in this proceeding. The Presiding Judge shall convene a prehearing conference in this proceeding at 10:00 a.m. on March 23, 1982 at the Commission's Offices, 825 North Capitol Street, N.E., Washington, D.C.

(C) All legal arguments raised in this proceeding by Public Service Company of Colorado and the Colorado River Water Conservation District in support of their argument that the United States is precluded from assessing headwater benefits payments for benefits received from the Green Mountain Reservoir are rejected.

(D) Public Service Company of Colorado shall pay to the United States, within 60 days of this order, the sum of $483,776 for headwater benefits received by its Shoshone Plant and for the costs of the investigation. Failure to pay the sum within 60 days will result in the imposition of interest effective December 11, 1979.

(E) The Secretary shall cause prompt publication of this order in the Federal Register.

APPENDIX C

Public Service Company of Colorado, Docket No. HB24-63-3
Order Denying Rehearing and Re-scheduling Prehearing Conference

(Issued August 4, 1982)

Before Commissioners: C. M. Butler III, Chairman; Georgiana Sheldon and J. David Hughes.

The Public Service Company of Colorado ("Public Service") filed a petition for rehearing of our order providing for hearing on the question of headwater benefits payments owed by Public Service for the benefits its Shoshone Powerplant receives from upstream federal reservoirs, primarily Green Mountain Reservoir. 18 FERC ¶ 61,110. Public Service objects to our ruling on several legal issues. The Colorado River Water Conservation District ("CRWCD"), an intervenor in the proceeding, also filed a petition for rehearing.

Post-1920 Construction

Public Service objects to our holding that its pre-1920 permit for the Shoshone Powerplant does not exempt it from headwater benefits payments.

Public Service argues that the Act of February 15, 1901 [1] governs *all* its rights and obligations respecting the Shoshone Powerplant.[2] That Act authorized the appropriate Cabinet Secretary to issue permits for the occupancy of United States lands for power purposes. Public Service argues that because the permit did not reserve to the appropriate Secretary the authority to charge for headwater benefits, the Commission cannot now assess headwater benefits payments.

We disagree. The Act of February 15, 1901 only authorized the issuance of a permit for the use of rights-of-way through various United States lands. This permit was the only

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[1] 43 U.S.C. § 959, 31 Stat. 790.

[2] *United States v. Colorado Power Co.*, 240 Fed. 217 (D. Colo. 1916).

Federal authorization required for the project when built.[3] Consequently, neither the 1901 Act nor the permit issued thereunder speaks to the power of the United States to assess headwater benefit charges against the project owner.[4] Federal rights and privileges are not waived or bestowed *sub silentio*.[5] Therefore, nothing in the 1901 Act can be construed to have waived the Federal Government's authority to assess headwater benefits charges.

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[3] This is in contrast to the case in *South Carolina Electric & Gas Co. v. Federal Power Commission*, 338 F.2d 898 (4th Cir. 1964), where the project owner's pre-1920 permit stemmed from the General Dam Act of June 21, 1906, which controlled the construction of dams across navigable waters. In *South Carolina* the court did not have to reach the question of whether a headwater benefit assessment would unconstitutionally deprive the project owner of rights vested in the permit, because both the enabling statute and the permit expressly reserved the government's right to subsequently assess headwater benefits payments.

[4] We believe that both the 1901 Act and the permit reserved to the Secretary of the Interior the power to impose on the permittee whatever additional conditions are within his legal ambit. The 1901 Act authorizes the Secretary to issue the permit "under general regulations to be fixed by him." The Secretary's regulations promulgated under the Act state that "any permission granted hereunder is also subject to such further and future regulations as may be adopted by the Department." 31 L.D. 13, 17 (1901). The court in *U.S. v. Colorado Power Co.* found similarly 240 Fed. at 221. If the Secretary ever had the authority to assess this permittee charges for headwater benefits, such authority was transferred to the exclusive jurisdiction of the Commission by the 1935 amendments to the Federal Power Act. 49 Stat. 842, 16 U.S.C. 803(f). If the Secretary never had such authority with respect to this permittee, then, as discussed below, the 1901 Act did not impliedly waive the authority of the United States to impose such charges.

[5] *Coosaw Mining Co. v. South Carolina*, 144 U.S. 550, 562 (1891) ("The doctrine is firmly established that only that which is granted in clear and explicit terms passes by a grant of property, franchise or privileges in which the government or the public has an interest. Statutory grants, of that character, are not to be construed strictly in favor of the public, and whatever is not uniquivocally [sic] granted is withheld; nothing passes by mere implication." (Citations omitted.)) Upheld *Knoxville Water Co. v. Mayor and Alderman of the City of Knoxville, et al.*, 200 U.S. 22 (1906).

Senate Document No. 80 [6] *and the Blue River Decree* [7]

Senate Document No. 80 provides that the water from 100,000 acre-feet of Green Mountain's storage capacity shall be available free of charge to existing and future irrigation and domestic appropriators of water. Public Service and CRWCD continue to argue that in Senate Document No. 80 Congress must have meant to waive payments for headwater benefits provided by the Green Mountin Reservoir. If this is so, then we of course agree that the Commission must defer to Congress' decision. However, as we discussed in our February 10 order, the free use of water stipulated in Senate Document No. 80 has no bearing on the collection of headwater benefits charges, which are assessed not against the appropriation of water but rather to recompense the government for stream flow regulation benefits provided by upstream Federal developments to power projects downstream. This is not altered by the fact that Senate Document No. 80 was adopted two years after the 1935 amendments to the Federal Power Act, which vested in the Commission the exclusive authority to assess headwater benefits charges. It remains the case that Federal rights are not waived by implication.[8]

Colorado Water Law and Fifth Amendment

Public Service arguments on these points have been addressed in our February 10 order. We will simply add that Section 10(f) of the Federal Power Act creates a statutory liability on the part of Public Service to reimburse the United States for any headwater benefits it receives. Contrary to CRWCD's assertion, no contractual or other right to the continued enjoyment of this benefit by Public Service arises by virtue of this statutory obligation.

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[6] 75th Cong., 1st Sess. (1937).

[7] *U.S. v. Northern Colorado Water Conservation District, et al.*, Civil Nos. 5016 and 5017, unreported (1955).

[8] *Coosaw Mining Co. v. South Carolina, supra.*

Motion to Hold Hearing in Abeyance

By our order of April 9, 1982, we granted motions filed by Public Service to hold this proceeding in abeyance.[9] Upon review of the requests for rehearing, we believe that there is no reason to further delay this proceeding. The Presiding Administrative Law Judge is ordered to reschedule the prehearing conference, to be held within the next 60 days.

The Commission orders:

(A) Petitions for rehearing filed by the Public Service Company of Colorado and the Colorado River Water Conservation District in Docket No. HB24-63-3 are denied.

(B) The Presiding Administrative Law Judge is ordered to schedule a prehearing conference in this proceeding, to be held within 60 days from the date of this order.

(C) The motion to hold the hearing in abeyance pending judicial review is denied.

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[9] Public Service renewed its motion in the petition for rehearing. Public Service requests that the hearing be delayed pending judicial review.

APPENDIX D

Public Service Company of Colorado, Docket No. HB-24-63-3-000

Opinion No. 200; Opinion Reversing Initial Decision and Dismissing Request for Rehearing

(Issued December 21, 1983)

Before Commissioners: Raymond J. O'Connor, Chairman; Georgiana Sheldon, J. David Hughes, A. G. Sousa and Oliver G. Richard III.

Appearances

James P. McCotter and *Timothy J. Flanagan* for the Public Service Company of Colorado

Robert I. McCarty, Michael N. McCarty and *Donald H. Hamburg* for the Colorado River Water Conservation District

Timothy J. Cooney and *Richard A. Azzaro* for the Staff of the Federal Energy Regulatory Commission

This proceeding involves two stipultated legal issues:

(1) Whether the Public Service Company of Colorado ("Public Service") is required to reimburse the United States for its costs in connection with an investigation under Section 10(f) of the Federal Power Act, 16 U.S.C. § 803(f), to determine the nature and extent of headwater benefits charges for its Shoshone hydroelectric project; and

(2) Whether the Commission has legal authority to assess the costs of a headwater benefits investigation against a party if that party is not legally liable for headwater benefits payments.

The Initial Decision answered the first question in the negative and accordingly found the second issue to be moot. We reverse the Initial Decision on the first issue and find the second question to be premature for final determination.

Background

The Shoshone hydroelectric project is owned and operated by Public Service. The project is not licensed under the Federal Power Act; rather, it is operated pursuant to a 1903 Department of the Interior permit.[1] The Shoshone plant is located on the Colorado River below the Federal Green Mountain Reservoir, which was constructed in 1942 and is operated by the U.S. Department of the Interior, Bureau of Reclamation. When Public Service contested a proposed determination of headwater benefits from Green Mountain to the Shoshone plant (in an amount of $433,464 for benefits and $50,311 for costs of studies), we ordered a hearing [2] and granted the intervention of Colorado River Water Conservation District.

In a settlement approved by the Commission,[3] the parties have agreed that, if it is judicially determined that Public Service is liable for headwater benefits,[4] such liability will total $400,000 plus interest for the period from November 16, 1942 through December 31, 1970, and $330,000 for the period January 1, 1971 through December 31, 1981. With regard to the question of the costs of the investigation, the parties have stipulated to amount of liability—$107,000—but have left for resolution the legal question of whether Public Service would be liable for such costs. The judge answered that legal question in the negative, and the matter is now before us.

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[1] Public Service claims it has a pre-1920 Federal permit that excepts the project from the licensing requirements of Section 23(b) of the Federal Power Act, 16 U.S.C. § 816(b).

[2] *Public Service Company of Colorado, et al.*, 18 FERC ¶ 61,110 (1982). In that order we also rejected Public Service's challenge to our jurisdiction under Section 10(f). Rehearing was denied, 20 FERC ¶ 61,149 (1982), and Public Service has appealed to the U.S. Court of Appeals, 10th Circuit (No. 82-1119).

[3] *Public Service Company of Colorado*, 23 FERC ¶ 61,035 (1983).

[4] *See* note 2, *supra*.

In addition, Public Service Company has sought rehearing of our order approving the settlement, raising only the issue of whether the question of the cost of investigations was before the judge. Since the judge has decided this question, and since we are in this order reviewing the judge's Decision,[5] Public Service's request for rehearing petition is moot, and we dismiss it on that ground.

Statutory Text

Section 10(f) of the Federal Power Act provides:

> [t]hat whenever any licensee hereunder is directly benefited by the construction work of another licensee, a permittee, or of the United States of a storage reservoir or other headwater improvement, the Commission shall require as a condition of the license that the licensee so benefited shall reimburse the owner of such reservoir or other improvements for such part of the annual charges for interest, maintenance, and depreciation thereon as the Commission may deem equitable. The proportion of such charges to be paid by any licensee shall be determined by the Commission. *The licensees or permittees affected shall pay to the United States the cost of making such determination as fixed by the Commission.*
>
> Whenever such reservoir or other improvement is constructed by the United States the Commission shall assess similar charges against any licensee directly benefited thereby, and any amount so assessed shall be paid into the Treasury of the United States, to be reserved and appropriated as a part of the special fund for headwater improvements as provided in Section 17 hereof.

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[5] In our order approving the parties' settlement, we expressed doubt that the issue now before us was within the scope of the hearing order and so whether it was properly before the judge. While we still have these doubts, we have no doubt that Public Service is entitled to raise the question of whether it is liable for the cost of investigations. For that reason, we address the question of the liability in the context of our review of the Initial Decision.

> Whenever any power project not under license is benefited by the construction work of a licensee or permittee, the United States or any agency thereof, the Commission, after notice to the owner or owners of such unlicensed project, shall determine and fix a reasonable and equitable annual charge to be paid to the licensee or permittee on account of such benefits, or to the United States if it be the owner of such headwater improvement. [Emphasis supplied.]

The last sentence of the first paragraph and the third paragraph were added in 1935.

The Issue and the Initial Decision's Resolution Thereof

The issue is whether a non-licensee such as Public Service falls within the terms of the sentence: "the licensees or permittees affected shall pay to the United States the cost of making such determination as fixed by the Commission."[6] Public Service argued to the judge that it does not, and advanced two alternative theories to support this argument.

It argued that the first paragraph of Section 10(f) deals with the obligation of licensees to pay headwater benefits, while the third paragraph (also added in 1935) deals with the obligation of non-licensees. Since the third paragraph does not expressly mention costs of investigation, Public Service argued that as a non-licensee it does not have to pay those costs.

Alternatively, Public Service argued that the "licensees or permittees affected," identified in the last sentence of the first paragraph as liable for investigation costs, refers not to downstream beneficiaries, but to the licensees or permittees owning the upstream project.[7]

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[6] The issue need not be so narrowly framed. See discussion below of the *South Carolina* proceeding. *South Carolina Electric & Gas Company*, Opinion No. 384, 29 FPC 624, 627 (Initial Decision, 29 FPC 631, 633, 681), *affirmed, South Carolina Electric & Gas Company v. F.P.C.*, 338 F.2d *supra*, 902, 906. For the purpose of review of the Initial Decision, however, the narrow framing of the issue suffices.

[7] It concedes that the Commission and the courts have rejected this argument. Public Service initial brief at 5, n. 3, citing *South Carolina Electric & Gas Co.*, 29 FPC 624, *supra*.

The Initial Decision adopted Public Service's second argument only. Since Public Service took no exception to the Initial Decision's failure to adopt its first argument,[8] the first argument is waived and technically is not before us. In any event, the first argument is without merit. The licensee/nonlicensee distinction between the first and third paragraph of Section 10(f) for investigation cost recovery has been rejected by the Commission and the courts. *South Carolina Electric & Gas Co.*, 29 FPC 624 (1964), *aff'd South Carolina Electric & Gas Co. v. F.P.C.*, 338 F.2d 898 (4th Cir. 1964). For this reason, the attempted distinction does not help Public Service, which, as the holder of a pre-1920 federal permit, is a "permittee," and thus included in the term "licensees or permittees affected." [9]

Public Service's second argument, which the judge adopted, is that "licensees or permittees affected" refers to upstream owners of the headwater improvement and not to the downstream beneficiaries.

Since Public Service is not an upstream owner but rather a downstream permittee, the judge held it not liable for the costs of investigations. We find that the judge's interpretation is not required by the statutory language or the legislative history, is inconsistent with prior Commission and judicial interpretation, and produces results that are inconsistent with the intent of the act. Accordingly, we reverse.

Legislative History, Statutory Construction and Prior Interpretation

The language of the statute, as amended in 1935, is not overly clear in certain respects. Moreover, the legislative history of the 1935 amendments to Section10(f) is sparse. However, it is clear that, as indicated by the Initial Decision, the purpose of the 1935 amendments was (1) to remove inequalities between licensees and non-licensees that previously

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[8] Public Service took no exceptions at all.

[9] Public Service's briefs never deny staff's argument (staff's initial brief at 9-10) that, as the holder of a pre-1920 Federal permit, Public Service is a permittee.

existed under Section 10(f) as enacted in 1920 and (2) to provide for payment to the United States of the costs of making headwater benefit determinations. These changes were made by the addition of (1) the third paragraph of the section, and (2) the last sentence of the first paragraph of the section. What is not as clear—and is the question before us—is the meaning of "affected" in the term "licensees and permittees affected" in the sentence added to the first paragraph.

The language of the statute suggests that "affected" licensees and permittees are both upstream and downstream entities. Both are affected by the headwater benefit determination: the downstream beneficiaries because they must pay for the benefit and the upstream providers because they will be paid for providing the benefit. We believe that this approach is more reasonable than the Initial Decision's statutory interpretation to the contrary. (23 FERC ¶ 63,036 at p. 65,087.)

Also, the statute's use of the singular "licensee" referring to the licensee being benefited, and to the licensee or permittee providing the benefits, and the use of the plural "licensees and permittees" referring to the "licensees and permittees affected" who must pay the costs of the headwater benefit determination, certainly suggest that the licensees and permittees affected include both the downstream and upstream entities.

The same singular versus plural usage occurs in the one committee report (of three [10]) that specifically refers to the provisions for payment to the United States of costs of headwater benefits determinations.[11] S. Rep. No. 621, 74th Cong. 1st Sess., states (at p. 344):

> In subsection (f) a provision requiring that the Commission shall require as a conditon of the license

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[10] S. Rep. No. 621 and H.R. Rep. No. 1318, 74th Cong., 1st Sess., discuss the Section 10(f) amendments; the conference report, H.R. Rep. No. 1903, 74th Cong., 1st Sess., does not, as there was no occasion to do so, since the language of the amendments to Section 10(f) did not change during Congressional consideration of the legislation.

[11] The Commission's analysis of the proposed amendments presented by Commissioner Seavey, and referred to in the Initial Decision (23 FERC

(footnote continues)

> that a licensee directly benefitted by the project of another licensee shall make reimbursement for such benefit is amended by including a requirement that the licensees affected shall pay to the United States the cost of making this determination as to benefits.

In summary, we believe that the legislative history and logical reading of the statute do no compel the result reached in the Initial Decision.[12] At least as reasonably, they indicate the result that, as the downstream beneficiary of a federal upstream improvement, Public Service would be liable for the costs of the headwater benefits determination.

This result is in accord with established, longstanding Commission interpretation. The commission has consistently (for over 40 years in some 40 cases [13]) held that "licensees or permittees affected," which are liable for investigation costs, means all the licensees and permittees involved in the headwater benefits determination, both upstream owners of the headwater improvement and downstream beneficiary licensees and permittees. Thus if the benefits are provided to a downstream licensee by an upstream licensee or permittee, then

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(footnote continued)

¶ 63,036 at p. 65,089), uses the same language as in S. Rep. No. 621, quoted above. Senate Hearings 390; House Hearings 237. In each of these instances, the language used in discussing the amendment refers only to licensees affected; the actual wording of the statute throughout this period, however, was "licensees and permittees." Thus the legislators' use of "licensees" is as a short-form reference and does not appear significant. Indeed, if anything, it argues against the Initial Decision's distinction in this context between "licensees" and "licensees and permittees."

[12] We note that the Initial Decision speaks of various matters not discussed herein. We do not believe these other matters are dispositive of the issue presented. For example, whether or not inequalities exist under *Grand River Dam Authority v. F.P.C.*, 246 F.2d 453 (10th Cir. 1957) (which applied the rule that grants by the United States in the public domain are to be construed in favor of the United States), is irrelevant.

[13] *See, e.g., Southern California Edison, et al.*, 1 FPC 567 (1939) (see also, Appendix A); *Alabama Power Co.*, 16 FPC 827 (1956); *Pennsylvania Electric Co.*, 16 FPC 710 (1956); *The Montana Power Co.*, 16 FPC 1388 (1956); *Alabama Power Company*, 13 FPC 1317 (1954); *South Carolina Electric & Gas Co.*, 40 FPC 306 (1968); *Georgia Power Company*, 50 FPC 243 (1973); *Virginia Electric and Power Co.*, 22 FERC ¶ 61,351 (1983).

they split the cost of that determination fifty-fifty.[14] If the benefits are provided to a downstream licensee by the United States, then the only licensee or permittee affected is the downstream licensee, which is then solely liable for the cost of determination.

The first headwater benefits case was decided shortly after the 1935 enactment of the statutory language in question. The Chairman in 1939 was Clyde L. Seavey, who, as a Commissioner, had testified at some length on behalf of the Commission in the 1935 hearings on the legislation.[15] This case established the principle followed by the Commission since that time.

In *South Carolina Electric and Gas Company v. F.P.C., supra,* the company had challenged the Commission's authority to impose the cost of a headwater benefits investigation on a downstream permittee. Although the Initial Decision found the case to be not dispositive because it is inconsistent with the Initial Decision's view of the legislative history (23 FERC ¶ 63,036 at p. 65,091), the Commission's consistent interpretation of the point in question was affirmed by the Court of Appeals. The court determined:

> [n]evertheless, continues the company, the word "permittee" used in the 1935 amendment refers only to an upstream permit holder who by construction work has benefited a lower licensee. Therefore, in authorizing assessment for benefits and costs against a permittee, the amendment could not have included a downstream permittee. This stiff construction we reject. The postils upon the amendment in its passage through Congress quite unsecretly demonstrate that the enactment was aimed at all unlicensed plants. To

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[14] *Southern California Edison Company,* Project Nos. 67, 96, 120 (March 24, 1934) (unreported). See Appendix A for a copy of this order.

[15] To the extent that the Initial Decision in the instant case, in reaching its result, relies on general statements contained in Commissioner Seavey's testimony, such statements cannot be read as supporting the Initial Decision. Such a reading would be completely inconsistent with the Commission's (including Chairman Seavey's) 1939 decision. Neither the briefs nor the Initial Decision makes any mention of the unreported 1939 decision. We assume that the presiding judge was unaware of it.

> uphold the Company's argument on this head would undo the 1935 amendment entirely and preserve the discrimination theretofore favoring the unlicensed dams—trespassers and permittees alike—over the licenses.

338 F.2d at 902.[16]

Accordingly, the Initial Decision should be reversed in view of the statute and its legislative history, the Commission's fairly contemporaneous and longstanding interpretation, and the court affirmance of that interpretation.

Practical Effect of Change in Prior Interpretation

Most of the upstream projects providing headwater benefits to downstream plants are owned by the Federal government. Thus, if we were to affirm the Initial Decision, it would mean that for those Federal upstream projects the practical effect would be to fail to collect the costs of headwater benefit investigations directly from those entities benefited. Instead, to collect the costs of the investigations, the Commission would need to treat these costs as part of the costs of administration of Part I of the Act under Section 10(e). This would mean that all licensees, even those not associated with headwater benefit investigations, would share the costs of the investigations. This result would undo the intent of the 1935 amendments to the Act by returning to Section 10(e) for collection of costs of most headwater benefit investigations.

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[16] Although the Initial Decision recognized the holding of the court, but believed it inconsistent with the legislative history, it appears the Initial Decision was swayed by the fact that the company in that case was also subject to the terms and conditions of a federal, War Department permit that provided an additional or supplementary basis for finding liability of the permittee for payment of the costs of the headwater benefits investigation. But a fair reading of the decision (338 F.2d at 902, 906) shows that the court relied principally on the 1935 amendments to Section 10(f), and the War Department permit only supported that result. Actually, the court's decision in *South Carolina* is broad in that it emphasized the congressional intent in 1935 to eliminate the discrimination "favoring the unlicensed dams—trespassers and permittees alike—over the licensed" (338 F.2d at 902).

The Second Issue

Like the Initial Decision, we do not decide the second issue, but for different reasons. The Initial Decision found the second issue to be moot; we find it to be premature for final decision. Public Service argues that:

> If it is ultimately determined, as a result of the judicial review proceedings in the Tenth Circuit, that Public Service is not liable for headwater benefits then, regardless of the Commission's authority to assess for investigation costs where headwater benefits are due, the Commission can obviously have no authority under Section 10(f) to assess Public Service Company for investigation costs.

Letter from Public Service to presiding judge dated February 8, 1983, quoted in *Public Service Company of Colorado,* 22 FERC ¶ 63,078 at p. 65,260 (1983).

We agree that if Public Service is found to be totally outside of the scope of the Commission's authority in Section 10(f), then it would not be liable for the costs of determining benefits. However, in view of the fact that an appeal is now pending in the court of appeals,[17] we also believe that the second issue should not be finally determined while the appeal is pending in court.

In the settlement which we approved on April 7, 1983, Public Service agreed to pay the stipulated amount into a trust account established for that purpose. The result is that the amount of payment is held in this account while Public Service raises its legal challenge in the Court of Appeals. Because we hold that the costs of determination issue may be affected by the outcome of this challenge, it is in keeping with the apparent intent of the settlement to provide for a similar escrow account here. We therefore order Public Service to pay the amount stipulated for cost of investigations ($107,000) into the account that was set up in the settlement approved on April 7, 1983 (or

[17] *See* f.n. 2.

if that cannot be done into a similar account established in the same manner).[18]

Conclusion

For the reasons set forth herein we find that the presiding judge's interpretation of the statute is contrary to prior Commission and judicial construction, is contrary to the policies of the Act, and is not supported by the statutory language or its legislative history. Accordingly, we reverse and find that Public Service, as a "permittee affected," is liable for the costs of investigation.

We do not reach the second issue. Rather, we reserve that issue until the Court of Appeals has acted on Public Service's appeal of our orders of February 10 and August 4, 1982.

The Commission orders:

(1) The Initial Decision issued April 26, 1983 in this docket is reversed, as provided in this order.

(2) The petition for rehearing filed on April 25, 1983 by Public Service Company of Colorado is dismissed.

(3) Public Service Company of Colorado is directed to pay $107,000 into a trust account as provided herein and in the settlement approved by the Commission on April 7, 1983.

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[18] In accordance with the terms of the approved settlement offer, this payment should be made within 30 days of the effective date of this order.

Appendix A

In the Matter of Southern California Edison Company Ltd. for Annual Charges Due from San Joaquin Light and Power Corporation, Project Nos. 67, 120, and 96.

Notice of Proposed Findings and Order Fixing and Allocating Costs of Making Headwater Benefits Determination.

(Issued March 24, 1939)

Commissioners: Clyde L. Seavey, Acting Chairman; Claude L. Draper, Basil Manly, John W. Scott.

Upon consideration of the proceedings which have been had relative to the determination of headwater benefits set forth in the Commission's determination of January 23, 1939, for the years 1923 to 1936, inclusive, with respect to projects Nos. 67, 120 and 96; and

It appearing to the Commission that under the provisions of Section 10(f) of the Federal Power Act it is necessary for the Commission to fix the cost of making such determination and that:

(a) Since making its determination on January 23, 1939, the Commission has not been requested by either party to reconsider its determination in any particular;

(b) It is now appropriate to fix the cost of making determination of headwater benefits in connection with the above projects; and

(c) The cost to the Commission of making the determination in this case was $6,556.54;

The Commission *finds* that the apportionment of one-half of the cost of making the aforesaid determination to each party is, under the circumstances, reasonable and within the intendment of the provisions of the Federal Power Act;

Notice is hereby given that:

(A) The Commission will adopt findings and enter an order in conformity with the foregoing recitals on or after April 20, 1939, unless prior thereto good cause to the contrary shall have been shown; and

(B) If either party desires to file objection to the aforesaid proposal, it should so notify the Commission prior to such date and file with the Commission and serve on the other party on or before the 20th day of April, 1939, a brief in writing setting forth its contentions in full.

In the Matter of Southern California Edison Company Ltd. and San Joaquin Light and Power Corporation, Project Nos. 67, 120, and 96

Order Fixing and Allocating Costs of Making Headwater Benefits Determination

(Issued May 2, 1939)

Commissioners: Clyde L. Seavey, Acting Chairman; Claude L. Draper, Basil Manly, John W. Scott.

Upon consideration of the proceedings which have been had relative to the determination of headwater benefits set forth in the Commission's determination of January 23, 1939, for the years 1923 to 1936, inclusive, with respect to projects Nos. 67, 120, and 96; and

It appearing to the Commission that:

(a) By its notice of March 24, 1939, the Commission stated that:

(i) The cost of making the determination of headwater benefits in connection with the above projects was $6,556.54;

(ii) It found that the apportionment of one-half of the cost of making the aforesaid determination to each party was, under the circumstances, reasonable and within the intendment of the provisions of the Federal Power Act;

(iii) It would adopt findings and enter an order in conformity with the foregoing recitals on or after April 20, 1939, unless prior thereto good cause to the contrary was shown;

(b) Neither of the above named parties has filed objections in the premises;

The Commission, having considered the aforesaid determination of January 23, 1939, and notice of March 24, 1939, *finds* that:

(1) The cost to the Commission of making the aforesaid determination was $6,556.54;

(2) The apportionment of one-half of such cost to each party is, under the circumstances, reasonable and within the intendment of the provisions of the Act; and

The Commission *orders* that:

(A) The cost of making the determination, which was $6,556.54, be and it hereby is apportioned equally between the Southern California Edison Company Ltd., and San Joaquin Light and Power Corporation;

(B) Payment of its proportionate share shall be made by each of the above named companies within thirty days of the receipt of a copy of this order.

APPENDIX E

Public Service Company of Colorado,
Docket No. HB24-63-3-005

Opinion No. 200-A; Order Denying Rehearing

(Issued February 16, 1984)

Before Commissioners: Raymond J. O'Connor, Chairman; Georgiana Sheldon, J. David Hughes, A. G. Sousa and Oliver G. Richard III.

The Public Service Company of Colorado has filed a petition requesting rehearing of our Opinion No. 200, 25 FERC ¶ 61,399, issued December 21, 1983. The company's petition raises no issues which were not disposed of adequately in Opinion No. 200. We therefore deny the company's petition for rehearing.

However, the company's petition raises a question concerning Opinion No. 200's provision for an escrow account. We will address that question to avoid any misunderstanding.

Opinion No. 200 orders the company to pay the amount in dispute here ($107,500) into the escrow account that was set up in the settlement agreement pertaining to headwater benefits approved on April 7, 1983, 23 FERC ¶ 61,035, *or into a similar account.* (Slip op. 10.)

The company's petition states, in a footnote, that the escrow account which was provided for by the settlement agreement has not yet been established. It also states:

> Because the Commission has ruled [in Opinion No. 200] on the merits of Public Service's liability for investigative costs, the Company is agreeable to proceeding with the Settlement, and the escrow will be established in the near future. Should the Commission deny the instant Request for Rehearing, the $107,500 will be deposited in the escrow account within 30 days . . .

We note that the $107,500 figure was the result of a stipulation, and that the requirement that the escrow account for investigation costs be established became effective as of 30 days after the issuance of Opinion No. 200.[1]

Moreover, the requirement that the escrow account under the aforementioned settlement agreement be established was binding at least by the date of Opinion No. 200. Yet neither escrow account has been established.

Since the company's obligation to establish both escrow accounts was fixed no later than 30 days after the issuance of Opinion No. 200, we require that interest on these accounts be calculated as of that date (*i.e.* January 20, 1984) and added to the escrow accounts. The rate of interest will be 12.73% per annum, compounded quarterly.[2] Furthermore, we require that both escrow accounts be established no later than 30 days after the issuance of this order.

Finally, inasmuch as there is a possibility that the company may prevail on the issue of its liability for headwater benefits but not on the issue of investigation costs,[3] we deem it advisable that two distinct escrow accounts be established. Thus any possible confusion over distribution of the respective escrow accounts will be avoided.

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[1] *See* note 18 of Opinion No. 200. Rule 713(e) of the Commission's Rules of Practice and Procedure provides that petitions for rehearing do not stay Commission orders.

[2] Article II of the settlement agreement provides for interest, at this rate, on the sums paid under that article.

[3] In Opinion No. 200 we found that resolution of the issue of whether a court decision exempting the company from headwater benefits charges would also exempt it from investigation costs was premature. We will address that question upon completion of the pertinent litigation on the Court of Appeals.

APPENDIX F

Public Service Company of Colorado,
Docket No. HB24-63-3-000

Initial Decision Finding No Statutory Liability for Assessment of Headwater Benefit Investigation Costs Upon the Owner of a Downstream Project Not Under License

(Issued April 26, 1983)

Bruce L. Birchman, Presiding Administrative Law Judge.

Appearances

James R. McCotter and *Timothy J. Flanagan* for the Public Service Company of Colorado.

Robert L. McCarty, Michael N. McCarty, and *Donald H. Hamburg* for the Colorado River Water Conservation District

Timothy J. Cooney and *Richard A. Azzaro* for the Staff of the Federal Energy Regulatory Commission.

This initial decision is concerned solely with resolution of the following two stipulated legal issues: (1) whether the Public Service Company of Colorado (Public Service) is required to reimburse the United States for Commission Staff costs in connection with an investigation under section 10(f) of the Federal Power Act, 16 U.S.C. 803(f), to determine the nature and extent of headwater benefit charges; and (2) whether the Commission has legal authority to assess the costs of a headwater benefits investigation against a party that is not legally liable for headwater benefits payments. This initial decision finds that the Commission lacks the authority under section 10(f) of the Act to assess the owner of a "project not under license" for the costs of a headwater benefits investigation. Consequently, Public Service is not statutorily obligated to reimburse the United States for any investigation costs that are associated with any determination of headwater benefit charges. In this circumstance, this initial decision further finds that the second stipulated legal issue is moot.

Nature of the Proceeding

The Shoshone hydroelectric plant is owned and operated by Public Service. Its construction and operation since 1909 emanates from a permit granted by the Secretary of the Interior on August 30, 1903, to enter upon public lands approximately 10 miles east of Glenwood Springs, Colorado for the purpose of generating electrical energy, pursuant to the Act of February 15, 1901, 31 Stat. 790, 43 U.S.C. § 959. Because the Shoshone plant is operated pursuant to a permit issued prior to June 10, 1920, it is expressly excepted from the Commission's licensing jurisdiction under section 23 (b) of the Federal Power Act. Public Service is the successor in interest to this permit.

The Shoshone plant is situated on the Colorado River in Garfield County, Colorado, *below* the federal Green Mountain Reservoir and Green Mountain Hydroelectric Power Plant. As noted by the Commission's *Order Providing for Hearing,* 18 FERC ¶ 61,110, the Green Mountain Reservoir was constructed in 1942 on the Blue River, 15 miles above its confluence with the Colorado River in Summit County, Colorado. It is operated by the Bureau of Reclamation of the United States Department of the Interior. The purpose of that reservoir is to replace water required by prior rights along the Colorado River, that is diverted to the eastern slope of Colorado by the Colorado-Big Thompson Project.

Public Service protested a notice issued December 11, 1979, by the Secretary of this Commission of proposed determination of headwater benefits of $433,465 for the period November 16, 1942, through December 31, 1970, and $50,311 for the costs of the Commission's study, all assertedly pursuant to section 10(f) of the Federal Power Act. By an order issued on February 10, 1982, 18 FERC ¶ 61,110, the Commission rejected certain legal challenges to the assertion of its jurisdiction under section 10(f) of the Act, granted intervention to the Colorado River Water Conservation District (District), [1] and assigned the matter for oral hearing. Following denial of

[1] By a letter petition filed on February 25, 1983, the District requested that it be dismissed as a party from this proceeding without prejudice to its

(footnote continues)

rehearing on August 4, 1982, 20 FERC ¶ 61,149, [2] I convened a prehearing conference on September 23, 1982, and adopted a procedural schedule which, *inter alia,* directed the parties to file a proposed stipulation of issues. A stipulation of factual issues and discrete legal issues and positions of the parties and Staff was adopted by my order of October 13, 1982, 21 FERC ¶ 63,015.

On November 8, 1982, I issued an order which denied Staff's motion for summary disposition filed on November 1, 1982. 21 FERC ¶ 63,043. I found that Public Service did not waive the right to raise the first stipulated legal issue as an affirmative defense. I further found, *inter alia,* that the two Congressional committee reports which Staff cited for its position that the legislative history of section 10(f) obligated Public Service to pay the costs of this headwater benefits investigation did not provide me with sufficient information to understand whether the 1935 amendments to section 10(f) evinced this policy or purpose; that Staff had failed to respond to the company's stipulated position that the third paragraph of section 10(f), rather than the first paragraph applies, and that the third paragraph precludes the assessment of investigation costs; and that a factual issue was present with regard to the amount of alleged investigation costs. 21 FERC at p. 65,192.

On January 19, 1983, Public Service filed an offer of settlement with the Commission. The parties to that offer of settlement, Public Service, intervenor District, and Commission

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(footnote continued)

right to prosecute its pending appeal of the Commission's orders of February 10, 1982, and August 4, 1982, before the United States Circuit Court of Appeals, Tenth Circuit, in No. 82180. It stated that the first stipulated legal issue is a matter in which it is completely disinterested, and that any further proceedings or subissue or side issue which may inject itself in the course of such further proceedings before the Presiding Judge should be determined and decided without the presence of the District and without prejudice to it. In this circumstance, good cause is present to grant the request and dismiss the District as a party to this proceeding with regard to the two stipulated legal issues.

[2] Appeal pending in No. 82-1119, United States Court of Appeals, Tenth Circuit, to overturn the finding that Public Service is liable for headwater benefits received by the Shoshone Hydroelectric Plant.

Staff, agreed per Articles II and III that if it were judicially determined that Public Service is liable for headwater benefits, such liability shall aggregate $400,000 plus interest for the period covered by the Commission's proposed notice, and $330,000 for the period January 1, 1971 through December 31, 1981. Article IV expressly reserved for hearing and decision the question of whether Public Service was required to reimburse the United States for Staff costs in connection with its investigation and, if so, the amount of those costs. Subsequently, the parties entered into a trial stipulation which limited Public Service's liability for the costs of investigation to $107,000, in the event that I determined that liablity for those costs was statutorily appropriate. I certified the offer of settlement and trial stipulation to the Commission on February 17, 1983. 22 FERC ¶ 63,059. My order of February 22, 1983, revised the stipulation of issues to limit adjudication to the two stipulated legal issues that are set forth in the opening paragraph of this decision. 22 FERC ¶ 63,078. Consonant with my order of November 8, 1982, which denied Staff's motion for summary disposition, I rejected as inappropriate Staff's stipulated position that Public Service had waived the right to adjudicate the first stipulated legal issue. As modified by the trial stipulation, the offer of settlement was approved by the Commission on April 7, 1983. 23 FERC ¶ 61,035.

This order also adopted the proposal of Staff and Public Service to adjudicate the stipulated legal issues upon consideration of their arguments as set forth in initial and reply briefs. Staff and Public Service filed simultaneous initial briefs by March 2, 1983, and like reply briefs by March 15, 1983. In response to my oral request on March 25, 1983, which was confirmed by my order of March 28, 1983, Public Service filed a supplemental brief on the latter date which included a copy of its permit. Although permitted by that order, Staff did not file a supplemental reply brief.

In its Initial Brief Staff argues that it is not barred from raising the matter of the propriety of adjudication of these legal issues because of its failure to request that I reconsider my order denying its motion for summary disposition. Staff states that its "motion for summary disposition did not present 'extraordinary

circumstances' and the Presiding Judge would properly have rejected any interlocutory appeal by the Staff, if one had been sought." As the Mock Turtle stated in Alice in Wonderland, this is "uncommon nonsense," and nothing more than an ad hoc rationalization of and by Staff counsel. The fact remains that had Staff sought the relief allowed by the Rules of Practice it could have been in a position to seek reconsideration of any denial of relief. Staff also recognizes that the Commission's order of February 10, 1982, did not specifically state that no legal issues may be raised. The first stipulated legal issue which Staff seeks to foreclose from adjudication was itself raised by Staff in a tentative stipulation of issues it offered at the prehearing conference. (Tr. 10) This issue later was embodied in the original stipulation of issues to which Staff was a party and which I adopted. This same legal issue later was expressly reserved for adjudication by the partial uncontested offer of settlement to which Staff was a signatory and which the Commission approved. Last, this same legal issue also was contained in the revised stipulation of issues which I adopted and which was not challenged by Staff.

These matters have been touched upon in prior orders entered in this proceeding and Staff's claim that Public Service has waived the right to adjudicate the first stipulated legal issue has been found wanting. Those orders remain unchallenged by Staff. In addition, no rule of law or regulation is cited which suggests that a party such as Public Service is precluded from raising any and all affirmative defenses to issues which are central to a proceeding. Consequently, there is no bar whatsoever to adjudication of the stipulated legal issues.

Turning to the merits of the first stipulated legal issue, Staff and Public Service each argue that the plain meaning of section 10(f) of the Act is dispositive of Public Service's liability for headwater benefit investigation costs (Staff IB at 9-10) and against the presence of such liability (Public Service IB at 3-8 and n.3 at 8).

Staff points to the language of the last sentence of the first paragraph of section 10(f), *viz.*, "The licensees or *permittees* affected shall pay to the United States the cost of making such

determination." (Staff's emphasis supplied) Staff argues that the "permittees affected" encompass those downstream permittees such as Public Service which have received headwater benefits from an upstream licensee.

On the other hand, Public Service argues that the first paragraph of section 10(f) is limited to that class of persons who are licensees, and dictates (1) that licensees who have received benefits by construction work of another licensee, a permittee, or the United States must reimburse the owner of the headwater improvement for such part of the annual charges for interest, maintenance, and depreciation; (2) that FERC is empowered to determine the porportion of such charges to be paid by any licensees; and (3) that the owner of the headwater improvement shall compensate the United States for the cost determination.

The third paragraph of section 10(f), Public Service avers, refers solely to "any power project not under license," *i.e.*, those persons such as Public Service who have been characterized as non-licensees. This paragraph coincides with the first paragraph only insofar as it requires the beneficiary non-licensees to pay a reasonable and equitable annual charge to the licensee, permittee, or the United States as the owner of the headwater improvement, and in its command to the FERC to determine and fix the annual charge. Reading the first and third paragraphs in *pari materia*, Public Service argues that if Congress had desired to require non-licensees to bear the cost of such investigations, the Congress would have expressly provided for this.

Staff also argues that the legislative history underlying section 10(f) as reflected in two committee reports that are discussed later supports its position (Staff IB at 14-15). Public Service maintains that this legislative history not only is silent as to the creation of such authority, but also in no ways implies its creation (Public Service IB at 8-10).

Last, Staff argues that the decision in *South Carolina Electric and Gas Company v. Federal Power Commission, (South Carolina)*, 338 F.2d 898 (4th Cir. 1964), is dispositive of Public Service's liability (Staff IB at 10-12). Public Service argues that the decision is inapposite (Public Service IB at 10).

Discussion and Conclusion

For the reasons next stated, the plain meaning of section 10(f) of the Federal Power Act, and the legislative history underlying section 10(f) of the Act, warrant the conclusion that Public Service, as the owner of a project not under license, is *not* liable for the costs of this headwater benefits investigation. This conclusion is without regard to the disposition of the pending litigation referenced in footnotes 1 and 2. There being no statutory liability for the payment by Public Service of investigation costs associated with a headwater benefits determination, resolution of stipulated legal issue #2 is unnecessary and moot.

We start with the statute itself. Section 10(f) provides,

> (f) That whenever any licensee hereunder is directly benefited by the construction work of another licensee, a permittee, or of the United States of a storage reservoir or other headwater improvement, the Commission *shall require* as a condition of the license *that the licensee so benefited shall reimburse the owner of such reservoir or other improvements* for such part of the annual charges for interest, maintenance, and depreciation thereon as the Commission may deem equitable. The proportion of such charges to be paid by any licensee shall be determined by the Commission. *The licensees or permittees affected shall pay to the United States the cost of making such determination as fixed by the Commission.*
>
> Whenever such reservoir or other improvement is constructed by the United States the Commission shall assess similar charges against any licensee directly benefited thereby, and any amount so assessed shall be paid into the Treasury of the United States, to be reserved and appropriated as a part of the special fund for headwater improvements as provided in section 17 hereof.
>
> *Whenever any power project not under license is benefited by the construction work of a licensee or permittee, the United States or any agency thereof, the*

> *Commission, after notice to the owner or owners of such unlicensed project, shall determine and fix a reasonable and equitable annual charge to be paid to the licensee or permittee on account of such benefits, or to the United States if it be the owner of such headwater improvement.* (Emphasis supplied.)

The arguments of Public Service and Staff that the plain meaning of section 10(f) and the legislative history is dispositive of the issues on their face are reminiscent of the biblical saying, "I am made all things to all men." I Corinthians 9:22. Upon examination, I find that the statutory interpretation advanced by Public Service is more logical and reasonable in light of the plain meaning of section 10(f) of the Act, and is supported by the legislative history discussed later.

Section 10(f) was amended in 1935 to add the last sentence in the first paragraph and the third paragraph. To appreciate fully the effect of the amendments to section 10(f), one must first recall the direction of the statute *prior* to the amendments. The thrust of the first paragraph of section 10(f) minus the last sentence manifested an obligation *only on the part of a licensee* directly benefited from the construction work or headwater improvement of another licensee or permittee or the United States *to reimburse the owner* of that construction work or headwater improvement in an equitable manner for certain annual charges which were to be determined by the FPC. *Grand River Dam Authority v. F.P.C.*, 246 F.2d 453, 455 (10th Cir. 1957) (Grand River). The added direction of the last sentence of the first paragraph that "licensees and permittees affected" pay the United States the cost of the Commission's determination logically and reasonably refers to those licensees or permittees referenced in the first two sentences of the paragraph who are *the owners* of the construction work or headwater improvement. It is those owners or upstream *licensees* who are entitled to compensation from a downstream licensee that has benefited from the construction work or headwater improvement owned by the upstream licensee, permittee, or by the United States.

Staff's interpretation of the first paragraph of section 10(f) requires the reader to believe that a paragraph that is con-

cerned with the obligation of "any licensee hereunder***directly benefited" embraces a separate obligation of a completely different entity, a permittee, to pay the costs of a headwater benefits investigation. Staff's interpretation strains the imagination by its compulsion to read the statutory direction "That whenever any licensee hereunder is directly benefited" as "That whenever any licensee *or* permittee hereunder is directly benefited" in order to conclude that the "licensees or permittees affected" who are required to pay the cost of a headwater benefits determination include a downstream permittee beneficiary.

The remaining two paragraphs of section 10(f), when read in *pari materia* with the first paragraph of section 10(f), reinforce my finding that Congress did not intend to obligate a downstream permittee with the costs of the Commission's headwater benefits investigation.

The second paragraph of section 10(f) was enacted as part of the Federal Power Act of 1920 simultaneously with the then two-sentence first paragraph. Like the first paragraph, the second paragraph was concerned with the obligation of a *licensee* directly benefited by an improvement. Its express concern was to ensure payment of compensation to the United States by the downstream *licensee* for a headwater benefit conferred by an upstream improvement of the United States. This paragraph was not changed by the amendments to section 10(f) in 1935.

The third paragraph added to section 10(f) in 1935 creates an obligation where none existed prior to 1935. Its plain language which is not disputed by Staff mandates the payment to the upstream owner (a licensee, permittee or the United States if it is the owner) of an equitable annual charge determined by the FPC, and now FERC, by a downstream "power project not under license . . . benefited by the construction work of a licensee or permittee." Like the direction in the first two sentences of the first paragraph of section 10(f), and the similar direction in the second paragraph of section 10(f), the charges for the headwater benefit received by the downstream "power project not under license" are to be paid to "the owner of such headwater improvement," *viz.*, the upstream licensee or permittee which conferred the benefit.

Noticeably absent from the new obligation imposed by the third paragraph upon owners of "power projects not under license" is a requirement that the United States, if it be the owner of "a power project not under license" compensate the upstream licensee or permittee for the receipt of a headwater benefit. This was one principal reason why the court in *Grand River* affirmed the FPC finding that headwater benefit charges were not intended to be paid by the United States. In this respect, in its brief to the court in *Grand River,* the FPC argued,

> Reading the statute with utmost favoritism toward petitioner's position, at most it would direct the Commission to determine and fix the annual charge to be paid to the licensee. *Presumably the payment is to be made by the owner of the project benefited.* (Brief of Respondent FPC at 9) (My emphasis supplied.)

By analogy, the plain meaning of the first paragraph of section 10(f) presumably requires the payment for the cost of the Commission's determination mandated by the first paragraph of section 10(f) to be made to the United States by the "licensees and permittees affected," *i.e.,* the owners of the project who are reimbursed for the benefits they confer downstream. In this instance, the owner of the project benefited, *i.e.,* "licensees or permittees affected," is the upstream licensee or permittee which provided a headwater benefit to the downstream licensee. The downstream licensee, in turn, is required to "reimburse the owner of such reservoir or other improvements."

Public Service argues that because the plain meaning of section 10(f) of the Act supports its position, my inquiry must start and end with the *words* of the statute, and, consequently, that my inquiry into the legislative history of this provision is foreclosed. I do not find this argument persuasive. In regard to a similiar argument, Justice Holmes observed in *Boston Sand Co. v. United States,* 278 U.S. 41, 48 (1928),

> It is said that when the meaning of language is plain we are not to resort to evidence in order to raise doubts. This is rather an axiom of experience than a

> rule of law, and does not preclude consideration of persuasive evidence if it exists.

Justice Frankfurter similarly observed that the plain meaning rule did not dominate the Court's descisions, and that the contrary doctrine has prevailed. *Association of Westinghouse Salaried Employees v. Westinghouse Electric Corp.*, 348 U.S. 437, 444 (1955). In *United States v. Monia*, 317 U.S. 424, 431-432 (1943) (dissenting opinion), he elaborated upon this as follows:

> This question cannot be answered by closing our eyes to everything except the naked words of the Act of June 30, 1906. The notion that because the words of a statute are plain, its meaning is also plain, is merely pernicious oversimplification. It is a wooden English doctrine of rather recent vintage (see Plucknett, A Concise History of the Common Law, 2d ed., 294-300; Amos, The Interpetation of Statutes, 5 Camb. L.J. 163; Davies, The Interpretation of Statutes, 35 Col. L. Rev. 519), to which lip service has on occasion been given here, but which since the days of Marshall this Court has rejected, especially in practice. E.g., *United States v. Fisher*, 2 Cranch 358, 385-86; *Boston Sand Co. v. United States*, 278 U.S. 41, 48; *United States v. American Trucking Assns.*, 310 U.S. 534, 542-44. A statute, like other living organisms, derives significance and sustenance from its environment, from which it cannot be severed without being mutilated. Especially is this true where the statute, like the one before us, is part of a legislative process having a history and a purpose. The meaning of such a statute cannot be gained by confining inquiry within its four corners. Only the historic process of which such legislation is an incomplete fragment—that to which it gave rise as well as that which gave rise to it—can yield its true meaning. And so we must turn to the history of federal immunity provisions.

The legislative history of section 10(f) is pertinent to resolution of the first stipulated legal issue. Research discloses

the following. Section 10(f) originated in the Federal Water Power Act of 1920. It then consisted only of the first paragraph *minus* the last sentence that is underscored above and the second paragraph. That statute was amended and superseded by the Federal Power Act in 1935. As stated, at that time section 10(f) was amended to include the last sentence in the first paragraph and a new third paragraph.

FPC Commissioner Seavey provided the Congress with an analysis of the then proposed amendment of section 10(f). That analysis stated that the first paragraph of section 10(f) "is amended by including a requirement that *the licensees affected* shall pay to the United States the cost of making this determination as to benefits." (emphasis supplied) Hearing on 1935 Public Utility Act, H.R. 5423, Before the Interstate and Foreign Commerce Committee, 74th Cong., 1st Sess., 390 (1935).

The new third paragraph of section 10(f), on the other hand, served a completely different purpose. The Commission's analysis went on to state that,

> A new paragraph is added to this subsection imposing upon the owners of power projects not under license the duty to pay compensation for *headwater benefits received* from the construction of licensed projects. *Every reason for the imposition of a duty to pay for benefits received that applies where the benefited property is licensed applies with equal force to the receipt of benefits by nonlicensees.* (Emphasis supplied) *Ibid.*

FPC Solicitor Devane characterized the inequality corrected by the new third paragraph of section 10(f) as follows:

> The amendment is exactly the same, *insofar as liability is concerned, that the law now imposes* upon one licensee to another. All dams in navigable waters are there under some governmental authority, either by Act of Congress, by a permit that has been issued by the War Department, by the Forest Service, by a license from the Federal Power Commission, or by some other agency of the Government, and it seems to us that *it is just as fair to assess projects with*

> *the benefits which have been constructed without a license* from the Federal Power Commission *as it is to assess those holding such licenses.* (Emphasis supplied.) *Id.* at 486.

As held in *Grand River,* the liability that the law *then imposed* upon one licensee to another concerned only the obligation to pay headwater benefit charges. It was this very obligation which was extended by the third paragraph of section 10(f) to downstream "projects not under license."

At the request of Representative Huddleston, Solicitor Devane provided a "typical illustration" of the application of the third paragraph. Devane noted that the downstream unlicensed Holtwood project which was owned and operated pursuant to a permit issued by the War Department was benefited by more than $14,000 a year from the discharge of water from the upstream licensed Safe Harbor project. Devane stated that "if that project was under license from the Federal Power Commission, under this act, as it is today, the Commission would be under the obligation to determine and assess that benefit." *Id.* at 487. Again, it is seen that the reach of the third paragraph only was with regard to the payment of headwater benefit charges by projects not then under license.

The identical analysis was incorporated in the Commission's testimony on S. 1725, the counterpart legislation before the Senate. Hearings on the 1935 Public Utility Act, S. 1725, Before Senate Committee on Interstate Commerce, 74th Cong., 1st Sess., 229-230, 237 (1935). The committee substituted S. 2796 for S. 1725. S. 2796, like S. 1725, contained the same proposed amendments to section 10(f). Hearings on the Public Utility Act, S. 2796, 74th Cong., 1st. Sess., 229-230, 233, 237 (1935).

When S. 2796 was reported out of committee, the committee noted that "it had before it the printed record of the testimony before the House committee which heard witnesses upon the companion House bill from February 19 to April 15, of this year." S.Rep. No. 621, 74th Cong., 1st Sess., 1 (1935). That testimony, it will be recalled, included the "typical illustration" provided by FPC Solicitor Devane of the in-

equality of unlicensed projects which under then existing law were not obligated to pay headwater benefit charges. It was that inequality which was to be remedied by the addition of the third paragraph to section 10(f).

Senate report No. 621 is one of the two pieces of the legislative history which Staff references in an appendix to its initial brief and which earlier was cited in Staff's motion for summary disposition. With regard to the amendment of section 10(f), the report reiterated the obligation created by the addition of the third paragraph of section 10(f), *viz., "that the duty of paying compensation for headwater benefits received* from the construction of licensed projects, which is now placed upon licensees, is extended to the owners of projects not under license." (Emphasis supplied.) The committee further observed that "The present provision results in great inequality, since the holder of a license is subject to *such assessment,* whereas one operating a project under permit issued by the War Department *may enjoy similar benefits* without having to pay for them." (Emphasis supplied.)

As seen, there is nothing in the description of the purpose and effect of the new third paragraph of section 10(f) set forth in Senate Report No. 621 which would remotely suggest that the Congress *also intended* to require projects not under license to pay for the costs of a headwater benefit investigation. As I have found previously, such an obligation was imposed by the addition of the last sentence to the first paragraph of section 10(f) only on those "licensees and permittees affected" or the owners of the upstream construction or headwater improvement. The discussion of the proposed amendment of section 10(f) by the third paragraph is concerned with equalizing the status of "licensees" that were then required to pay for *headwater benefits* and that of "projects not under license" which were not then subject to that obligation.

A substitute version of S. 2796 which contained identical amendments to section 10(f) was considered by the House. *See* H.R. Rep. No. 1318, 74th Cong., 1st Sess., 40 (1935). This is the only other legislative document upon which Staff posits its case that Public Service as a downstream permittee is liable for the payment of headwater benefit investigation costs.

With regard to the new third paragraph of section 10(f), that report described its purpose and effect in virtually identical language to that quoted from the Senate report. *Id.* at 25. The committee summarized the nature and effect of the two amendments. The first paragraph of section 10(f) was "amended by including a requirement that *the licensees affected* shall pay to the United States the cost of making this determination as to benefits." (Emphasis supplied.) The totally new third paragraph to section 10(f) was described as "a new paragraph which *imposes* upon the owners of projects not under license *the same duty to pay compensation for headwater benefits received* from the construction of licensed projects that is now placed upon licensees." (Emphasis supplied.)

The committee further commented that,

> As the subsection now stands, the holder of a permit issued by the War Department before the passage of the Water Power Act may enjoy substantial benefits from the construction of a licensed project without having to pay any compensation; a project constructed under license since the passage of the act has to pay for these benefits. *The amendment removes the inequality.* (Emphasis supplied.)

Because of the differences between the House and Senate versions of S. 2796, the bills were considered by a committee of the conference. While certain amendments were made to S. 2796, the identical amendments to section 10(f) present in the House and Senate versions of S. 2796 were left unchanged. *See* H.R. Rep. No. 1903, 74th Cong. 1st Sess. (1935). As reported out to the Congress, S. 2796 was enacted into law and set forth section 10(f) in its present form.

Staff's recitation of the legislative history from which it concludes that Congress imposed an obligation upon "projects not under license" to pay not only for headwater benefits received, but also for the costs of a headwater benefits investigation rests upon the discussion of these amendments only in the House and Senate committee reports of S. 2796. The fuller legislative history recited above, by comparison, clearly establishes that Congress sought to achieve two principal objects by the amendment of section 10(f).

First, Congress obligated the "licensees and permittees affected" or upstream owners of construction works or headwater improvements that had conferred a headwater benefit upon a downstream *licensee* to pay for the costs of a headwater benefits investigation. This was accomplished by the addition of the last sentence in and to the first paragraph of section 10(f).

Second, inequality in the law as it stood prior to these amendments which Congress redressed was that between licensees which received headwater benefits and were obligated to pay an equitable charge for those benefits, and owners of projects not under license such as the Holtwood Company and the Holtwood project which were unlicensed and were not required to pay for the receipt of headwater benefits conferred by an upstream owner. This and only this was accomplished by the amendment of section 10(f) to include the third paragraph of section 10(f) in its present form.

It remains a fact of life that the amendment of section 10(f) in 1935 did not eliminate all inequalities in the status of various entities with regard to headwater benefits. As found, the Congress did not place owners of licensed or permitted projects and owners of projects not under license on a par as concerns the payment of the costs of a headwater benefits determination. Congress also has not seen the need to redress the inequality of a *federal* government project downstream from a non-federal licensee which receives headwater benefits but is not obligated to pay headwater benefit charges to the licensee owner of the project which has conferred those benefits. *Grand River.* In this latter respect, several bills, including S. 1574, 84th Cong., 2d Sess. (1956), and H.R. 2438, 85th Cong., 1st Sess. (1957) were initiated to rectify this inequality which was highlighted in *Grand River.* None were enacted.[3]

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[3] The FPC's *Order Dismissing Petition for Headwater Benefit Determination,* 16 FPC 1039, 1041 (1956), which was appealed and affirmed in *Grand River* noted that both the complainant licensee in *Grand River* and the FPC urged favorable consideration of S. 1574 in 1956 before the Congress, and that the Congress adjourned without passing S. 1574. Respondent FPC's brief in *Grand River* at 20 also referenced the Commission's support for the then pending H.R. 2438.

That the world might be better off if each of these inequalities were redressed, is no predicate for reading into section 10(f) of the Act an obligation that Congress consciously chose not to implant. Equally apropos here is the observation in *Mid-Louisiana Gas Co. v. Federal Energy Regulatory Commission* 664 F.2d 530, 535 (5th Cir. 1981), that "It is not an agency's prerogative to alter a statutory scheme even if its alteration is as good or better than the congressional one."

Staff further argues that the decision in *South Carolina* underscores its position that the legislative history of section 10(f) requires owners of projects not under license to pay not only headwater benefit charges, but also to pay the agency headwater benefit investigation costs. In *South Carolina* the court affirmed an FPC order which held that the downstream Stevens Creek project constructed and operated under a permit issued by the Secretary of the Interior pursuant to the General Dam Act of June 21, 1906, was obligated under section 10(f) of the Federal Power Act to pay headwater benefit charges as well as headwater benefit investigation costs. With regard to the company's challenge of the assessment of FPC investigation expenses, the court held, 386 F.2d at 906,

> Nothing is adduced to disprove the reasonableness of this sum, and we have no doubt of the responsibility of the Company for it. *The statute declares the liability. Condition 9 of the Company's permit recognizes it:* (Emphasis supplied.)
>
> [9] 'That said company shall reimburse the United States for any and all expenses to which it has been placed in connection with the proposed power development, *or which may hereafter be incurred with reference thereto, including the cost of any investigations necessary for the approval of plans* and of such supervision of construction as may be necessary in the interest of the United States.'

In holding that "The statute declares the liability," the court did not discuss the legislative history underlying section 10(f) of the Act. For the reasons set forth above, this holding in *South Carolina* is inconsistent with the legislative history as set forth

in this initial decision, and, to this extent, is not binding upon the FERC, and is not dispositive of the first legal issue.

Staff also points to an earlier passage in *South Carolina* where the court alluded to the legislative history underlying the third paragraph and the scope of the term "projects not under license." The court rejected the company's contention that,

> in authorizing assessments for benefits and costs against a permittee, the amendment could not have included a downstream permittee, such as Stevens Creek. ***The postils upon the amendment in its passage through Congress quite unsecretly demonstrate that the enactment was aimed *at all unlicensed plants.* (my emphasis supplied) 338 F.2d at 902.

In this respect, this holding in *South Carolina* is supported by the legislative history of section 10(f) only insofar as the court concluded that the term "project not under license" essentially was comprehensive in scope. That fact is discrete. FPC Solicitor Devane was careful to point out in his discussion of a "typical illustration," Hearings on H.R. 5423 *supra* at 187,

> The amendment is exactly the same, insofar as liability is concerned that the law *now imposes upon one licensee to another licensee.* All dams in navigable waters are there under some governmental authority, either by Act of Congress, by a permit that has been issued by the War Department, by the Forest Service, by a license from the Federal Power Commission, or by some other agency of the Government, and it seems to us just as fair *to assess projects with the benefits* which have been constructed without a license from the Federal Power Commission as it is to assess those holding such licenses. (Emphasis supplied.)

This holding is too broad, however, insofar as it might be considered to embrace within its sweep an obligation by a downstream *federal* unlicensed project to pay headwater benefits. *Grand River,* and the just referenced legislative history are to the contrary.

The court in *South Carolina* also stated that "Condition 9 of the Company's permit recognizes it [statutory liability for headwater benefit investigation costs]." *South Carolina,* 338 F.2d at 906. Staff further argues that this is not a holding, but only a *dicta.* Staff points to the limitation on the payment of expenses in condition 9 "including the cost of any investigations necessary for the approval of such plans and of such supervision of construction as may be necessary" and states,

> [13] Despite the court's *dicta* on the non-licensee's permit, it is noteworthy that the only costs required to be reimbursed in accordance with the permit are those necessary for the approval of plants and supervision of construction. Headwater benefits investigations do not relate to either of those factors. Moreover, neither the Staff briefs, the hearing examiner's recommended decision, nor the Commission's opinion mentioned the terms of the permit on this issue. For these reasons the court's *dicta* should not be given any weight.

Its reply brief at 3, n.4 reiterates this perception.

This argument ignores the fact that the Department of Justice in its separate brief to the court in *South Carolina* focused explicitly upon the terms of the company's permit for its discrete position that the permit conditions expressly warranted liability for the payment of headwater benefits investigation costs. Brief of the United States Department of Justice, sIV, 51-52. The court's attention was directed not only to the terms of permit condition 9 which the court referenced, but also to condition 7 of the permit quoted elsewhere in *South Carolina, viz.,*

> Under [Special Condition 9]* of its permit, it agreed to 'reimburse the United States for any and all expenses' to which it has been placed in connection with the proposed power development, or which hereafter may be incurred with reference thereto,' including, necessarily the cost of determining under

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* Corrected to "Special Condition 7" by erratum issued by Judge Birchman April 28, 1983.

> Special Condition 7 (See *supra* p. 20), proper charges should any direct benefit be received by said company from the construction, operation and maintenance by the United States of storage reservoirs, at the headwaters of said Savannah River or its tributarries [sic]***

I note too that the FPC made a somewhat similar argument as part of its argument that the statute created liability for agency headwater benefit investigation costs. Commission Brief, pp. 11-13. The argument that the Staff now makes with regard to the *limitation* on the payment of costs by the company in *South Carolina* owing to the terms of permit condition 9 is the very argument which the company made, the Commission and the Department of Justice opposed, and the court rejected insofar as *South Carolina* premised its holding of liability for agency investigation on the terms of the company's permit. *Compare* Petitioners Reply Brief at 37, with the briefs of Justice, and the FPC, *supra.*

The second stipulated legal issue is whether the Commission has legal authority to assess the costs of a headwater benefits investigation against a party that is not legally liable for headwater benefits payments. Staff argues that even if the pending judicial litigation referenced in footnotes 1 and 2 is decided in favor of Public Service, the company is still liable for headwater benefit investigation assessments because section 10(f) contains no exemptions to the reimbursement of costs provision. IB at 17-19. Staff posits that agencies must be free to conduct an investigation to determine whether the entity or activities come within the agency's regulatory authority, and that part of an investigation entails determining whether any benefits were received at all and whether the company was liable for payment. IB at 18.

While these rationales are reasonable, the matter of ultimate liability for these costs in issue here is moot in light of my finding and conclusion that section 10(f) by its terms as well as its underlying legislative history does not establish any liability for the payment by the owner of a downstream project not under license for the costs of an investigation to determine the

nature and extent of headwater benefit charges. Stated differently, since Public Service is the owner of a "project not under license," an entity which Congress did not obligate to pay these costs, any assessment of these costs would be *ultra vires* the statute and improper.

Ultimate Findings and Conclusions

Based upon the foregoing, and subject to review by the Federal Energy Regulatory Commission on appeal or upon the Commission's own motion as provided by the Commission's Rules of Practice and Procedure, the following findings are entered:

1. Public Service Company of Colorado (Public Service) is an electric utility subject to the jurisdiction of this Commission pursuant to the Federal Power Act.

2. As set forth in this initial decision, Public Service is the owner of the Shoshone plant, a "project not under license," as those terms are employed in the third paragraph of section 10(f) of the Federal Power Act.

3. As set forth in this initial decision, Public Service is not liable to the United States for the payment of the cost of this Commission's investigation and determination that Public Service Company shall reimburse the United States for the equitable portion of any headwater benefits which it is said to have recieved. In this respect, Public Service is not a "permittee affected" as that term is employed in the last sentence of the first paragraph of section 10(f) of the Federal Power Act.

4. As set forth in this intial decision and in light of the immediately preceding finding, the issue of whether the Commission has legal authority to assess the costs of a headwater benefits investigation against a party that is not statutorily liable for headwater benefits is moot.

5. As set forth in this initial decision, the petition for withdrawal by intervenor Colorado River Water Conservation District is granted.

6. Subject to the payment of headwater benefit charges by Public Service in accordance with the terms of a partial uncontested offer of settlement approved by the Commission on April 7, 1983, 23 FERC ¶ 61,035, this investigation is terminated.

Order

As set forth in ultimate finding and conclusion # 6, this investigation is terminated within 30 days of the date of this order unless the Commission otherwise directs.

APPENDIX G

MAY TERM-JUNE 4, 1985

Before the Honorable James E. Barrett, The Honorable Stephanie K. Seymour and The Honorable William E. Doyle, Circuit Judges.

PUBLIC SERVICE COMPANY OF COLORADO,
Petitioner,

vs.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

Nos. 82-2119
82-2180
84-1343

This matter comes on for consideration of petitioner's petition for rehearing filed in the captioned cases.

Upon consideration whereof, the petition for rehearing is denied.

HOWARD K. PHILLIPS, Clerk

By ROBERT L. HOECKER
Robert L. Hoecker, Chief Deputy Clerk

APPENDIX H

Section 10(f) of the Federal Power Act, 16 USC § 803(f):

Reimbursement by licensee of other licensees, etc.

That whenever any licensee hereunder is directly benefited by the construction work of another licensee, a permittee, or of the United States of a storage reservoir or other headwater improvement, the Commission shall require as a condition of the license that the licensee so benefited shall reimburse the owner of such reservoir or other improvements for such part of the annual charges for interest, maintenance, and depreciation thereon as the Commission may deem equitable. The proportion of such charges to be paid by any licensee shall be determined by the Commission. The licensees or permittees affected shall pay to the United States the cost of making such determination as fixed by the Commission.

Whenever such reservoir or other improvement is constructed by the United States the Commission shall assess similar charges against any licensee directly benefited thereby, and any amount so assessed shall be paid into the Treasury of the United States, to be reserved and appropriated as a part of the special fund for headwater improvements as provided in section 810 of this title.

Whenever any power project not under license is benefited by the construction work of a licensee or permittee, the United States or any agency thereof, the Commission, after notice to the owner or owners of such unlicensed project, shall determine and fix a reasonable and equitable annual charge to be paid to the licensee or permittee on account of such benefits, or to the United States if it be the owner of such headwater improvement.

Section 23(a) of the Federal Power Act, 16 USC § 816:

Preservation of rights vested prior to June 10, 1920

The provisions of this subchapter shall not be construed as affecting any permit or valid existing right-of-way granted prior to June 10, 1920, or as confirming or otherwise affecting any

claim, or as affecting any authority heretofore given pursuant to law, but any person, association, corporation, State, or municipality holding or possessing such permit, right-of-way, or authority may apply for a license under this chapter, and upon such application the Commission may issue to any such applicant a license in accordance with the provisions of this subchapter and in such case the provisions of this chapter shall apply to such applicant as a licensee under this chapter: *Provided,* That when application is made for a license under this section for a project or projects already constructed the fair value of said project for a project or projects determined as provided in this section, shall for the purposes of this subchapter and of said license be deemed to be the amount to be allowed as the net investment of the applicant in such project or projects as of the date of such license, or as of the date of such determination, if license has not been issued. Such fair value shall be determined by the Commission after notice and opportunity for hearing.

Section 27 of the Federal Power Act, 16 U.S.C. § 821:

State laws and water rights unaffected

Nothing contained in this chapter shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein.

APPENDIX I

The Act of February 15, 1901, 31 Stat. 790:

—An Act Relating to rights of way through certain parks, reservations, and other public lands.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be, and hereby is, authorized and empowered, under general regulations to be fixed by him, to permit the use of rights of way through the public lands, forest and other reservations of the Unted States, and the Yosemite, Sequoia, and General Grant national parks, California, for electrical plants, poles, and lines for the generation and distribution of electrical power, and for telephone and telegraph purposes, and for canals, ditches, pipes and pipe lines, flumes, tunnels, or other water conduits, and for water plants, dams, and reservoirs used to promote irrigation or mining or quarrying, or the manufacturing or cutting of timber or lumber, or the supplying of water for domestic, public, or any other beneficial uses to the extent of the ground occupied by such canals, ditches, flumes, tunnels, reservoirs, or other water conduits or water plants, or electrical or other works permitted hereunder, and not to exceed fifty feet on each side of the marginal limits thereof, or not to exceed fifty feet on each side of the center line of such pipes and pipe lines, electrical, telegraph, and telephone lines and poles, by any citizen, association, or corporation of the United States, where it is intended by such to exercise the use permitted hereunder or any one or more of the purposes herein named: *Provided,* That such permits shall be allowed within or through any of said parks or any forest, military, Indian, or other reservation only upon the approval of the chief officer of the Department under whose supervision such park or reservation falls and upon a finding by him that the same is not incompatible with the public interest: *Provided further,* That all permits given hereunder for telegraph and telephone purposes shall be subject to the provision of title sixty-five of the Revised Statutes of the United States, and amendments thereto, regulating rights of way for telegraph companies over the public domain: *And provided further,* That any permission given by the

Secretary of the Interior under the provisons of this Act may be revoked by him or his successor in his discretion, and shall not be held to confer any right, or easement, or interest in, to, or over any public land, reservation, or park.

APPENDIX J

Excerpts from Senate Document No. 80, 75th Cong. 1st Sess. 2-3 (1937)

MANNER OF OPERATION OF PROJECT FACILITIES AND AUXILIARY FEATURES

The construction and operation of this project will change the regimen of the Colorado River below the Granby Reservoir. The project contemplates the maximum conservation and use of the waters of the Colorado River, and involves all of the construction features heretofore listed. In addition thereto certain supplemental construction will be necessary. This will be for the primary purpose of preserving insofar as possible the rights and interests dependent on this water, which exist on both slopes of the Continental Divide in Colorado. The project, therefore, must be operated in such a manner as to most nearly effect the following primary purposes:

1. To preserve the vested and future rights in irrigation.

2. To preserve the fishing and recreational facilities and the scenic attractions of Grand Lake, the Colorado River, and the Rocky Mountain National Park.

3. To preserve the present surface elevations of the water in Grand Lake and to prevent a variation in these elevations greater than their normal fluctuation.

4. To so conserve and make use of these waters for irrigation, power, industrial development, and other purposes, as to create the greatest benefits.

5. To maintain conditions of river flow for the benefit of domestic and sanitary uses of this water.

In order to accomplish these purposes the project should be operated by an unprejudiced agency in a fair and efficient manner, equitable to all parties having interests therein, and in conformity with the following particular stipulations:

(a) The Green Mountain Reservoir, or similar facilities, shall be constructed and maintained on the Colorado

River above the present site of the diversion dam of the Shoshone power plant, above Glenwood Springs, Colo., with a capacity of 152,000 acre-feet of water, with a reasonable expectancy that it will fill annually. Of said capacity, 52,000 acre-feet of water stored therein shall be available as replacement in western Colorado, of the water which would be usable there if not withheld or diverted by said project; 100,000 acre-feet shall be used for power purposes; and all of said stored waters shall be released under the conditions and limitations hereinafter set forth.

(b) Whenever the flow in the Colorado River at the present site of said Shoshone diversion dam is less than 1,250 cubic feet per second, there shall, upon demand of the authorized irrigation division engineer or other State authority having charge of the distribution of the waters of this stream, be released from said reservoir as a part of said 52,000 acre-feet, the amount necessary with other waters available, to fill the vested appropriations of water up to the amount concurrently being diverted or withheld from such vested appropriations by the project for diversion to the eastern slope.

(c) Said 100,000 acre feet shall be stored primarily for power purposes, and the water released shall be available, without charge, to supply existing irrigation and domestic appropriations of water, including the Grand Valley reclamation project, to supply all losses chargeable in the delivery of said 52,000 acre-feet of water, and for future use for domestic purposes and in the irrigation of lands thereafter to be brought under cultivation in western Colorado. It shall be released within the period from April 15 to October 15 of each year as required to supply a sufficient quantity to maintain the specified flow of 1,250 cubic feet per second of water at the present site of said Shoshone diversion dam, provided this amount is not supplied from the 52,000 acre-feet heretofore specified. Water not required for the above purposes shall also be available for disposal to agencies for the development of the shale oil or other industries.

(d) The cost of construction and perpetual operation and maintenance of said reservoir or reservoirs shall be a charge against the project and shall be paid from revenues collected from this project as may be provided in contracts between the Secretary of the Interior and the beneficiaries of the project in eastern Colorado, and any other contracting parties.

Supreme Court, U.S.
FILED
DEC 11 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-573

In the Supreme Court of the United States

OCTOBER TERM, 1985

PUBLIC SERVICE COMPANY OF COLORADO, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

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BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether petitioner is exempt from the obligation imposed by Section 10(f) of the Federal Power Act, 16 U.S.C. 803(f), to pay the United States for the benefits petitioner receives from headwater improvements made by the United States that enhance the ability of one of petitioner's hydroelectric plants to produce energy.

2. Whether petitioner is required to reimburse the United States for the costs incurred by the Federal Energy Regulatory Commission to ascertain and fix the amount of petitioner's headwater benefit payment.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 754 F.2d 1555. The orders of the Federal Energy Regulatory Commission (Pet. App. 1b-8b, 1c-4c, 1d-14d, 1e-2e) are reported at 18 F.E.R.C. ¶ 61,110, 20 F.E.R.C. ¶ 61,149, 25 F.E.R.C. ¶ 61,399, and 26 F.E.R.C. ¶ 61,896.

JURISDICTION

The judgment of the court of appeals was entered on February 15, 1985, and a petition for rehearing was denied on June 4, 1985 (Pet. App. 1g). On August 21, 1985, Justice White extended the time within which to file a petition for a writ of certiorari to and including October 2, 1985, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In Part I of the Federal Power Act, 16 U.S.C. 792 *et seq.*, Congress established a comprehensive licensing and regulatory scheme to control the development and operation of hydroelectric projects on the navigable waters of the United States.[1] Under this Part of the Act, it is unlawful for any person to construct or operate any facility to generate electric power along, across or in any navigable waters of the United States, unless the operator has obtained a license from the Federal Energy Regulatory Commission (Commission) or holds a valid pre-1920 governmental permit. § 23(b), 16 U.S.C. 817.

The Act imposes a number of obligations on licensees and permittees, including the provision at issue here (§ 10(f), 16 U.S.C. 803(f)) relating to payment for headwater benefits. Headwater benefits are the benefits a hydroelectric project receives in the form of increased or more reliable energy production, as a result of the construction of improvements upstream (such as storage reservoirs) that regulate the flow of the river. As the Commission explained here, "regulated flow releases provide a more dependable stream flow by storing water during peak run-off periods to be released during drier months." Pet. App. 6b n.11. More dependable stream flows usually translate into more reliable, and increased, energy production for the downstream project.

Section 10(f) of the Act (set forth at Pet. App. 1h-2h) requires the Commission to determine both the amount of benefit received by the downstream project in the form of energy gains from the upstream regulation of the stream flow, and the amount of money the owner of the down-

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[1] The statute was first enacted in 1920 as the Federal Water Power Act, ch. 285, 41 Stat. 1063 *et seq.* In 1935, when Congress created a scheme for federal regulation of the distribution, sale, and operation of wholesale electric utilities (§§ 301-320, 16 U.S.C. 825-825r), the Federal Water Power Act became Part I of the Federal Power Act.

stream project should pay to the owner of the upstream project in return for these headwater benefits. Section 10(f) imposes the obligation equally upon the owner of licensed and unlicensed projects to pay for headwater benefits received from upstream improvements. Where the upstream project is built by the United States, the statute directs that the headwater benefit assessment is to be paid into a special fund to underwrite the construction, maintenance, and operation of headwater or other improvements on the navigable waters of the United States.

The basic obligation of licensees to pay for headwater benefits was established in the 1920 Federal Water Power Act. When the Act was amended in 1935 Congress extended the obligation to permittees as well, by adding a third paragraph to Section 10(f) at the request of the Federal Power Commission (the predecessor of the Federal Energy Regulatory Commission).[2] At that time, Congress also added a new last sentence to the first paragraph of Section 10(f), directing that the "licensees or permittees affected" are to pay to the United States the Commission's costs incurred to make the headwater benefit assessment.[3]

2. This case began in 1973 when the Commission's staff initiated an investigation of the headwater benefits in the Colorado River Basin. As part of that investigation, petitioner was asked to provide data concerning several of its hydroelectric projects. At the conclusion of the investigation, the staff notified the company that its Shoshone Plant, located along the Colorado River on federal lands in the White River National Forest, received sufficient energy gains from headwater improvements made by the

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[2] The responsibilities of the Federal Power Commission were transferred to the Federal Energy Regulatory Commission as of October 1, 1977, by the Department of Energy Organization Act, 42 U.S.C. 7101, 7172.

[3] The 1935 amendments were based on the agency's experience with the administration of the Act. See H.R. Rep. 1318, 74th Cong., 1st Sess 7 (1935); S. Rep. 621, 74th Cong., 1st Sess. 17 (1935).

Green Mountain Reservoir, a project of the Bureau of Reclamation on an upstream tributary of the Colorado River, to require the payment of headwater benefit charges. The Shoshone Plant was constructed in 1909 under the authority of a right-of-way permit from the Secretary of the Interior and continues to operate by virtue of that permit alone; it is not licensed under the Federal Power Act.[4] As a result of the staff finding, the Commission issued an order that required petitioner to pay for the headwater benefits it receives, and ordered a hearing to establish the exact amount to be paid (Pet. App. 1b-8b).

In response to petitioner's objections, still pressed in this Court, the Commission held that the fact that the Shoshone Plant operates under a pre-Federal Power Act permit did not preclude the assessment of headwater benefit charges because Section 10(f) of the Act provides for the assessment of such charges against both licensed and unlicensed projects (Pet. App. 2b). On rehearing, the Commission elaborated on its view that the 1901 Act, under which the Shoshone Plant permit was issued, did not preclude the assessment of headwater benefit charges, and that the Act's silence on that point could not be construed as waiving the government's right to assess such charges subsequently (Pet. App. 2c). The Commission concluded that neither of the two documents that govern the operation and maintenance of the Green Mountain Reservoir bars the assessment under Section 10(f) of headwater benefits charges (Pet. App. 2b-5b).[5] With respect to

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[4] Projects that predate the 1920 enactment of the Federal Power Act and operate under a valid pre-1920 permit are allowed to continue to operate without a license by Sections 23(a) and 23(b) of the Federal Power Act, 16 U.S.C. 816 and 817. It has been assumed throughout this litigation that the Shoshone Plant is operated under a valid pre-1920 right-of-way permit.

[5] The two documents are: (1) S. Doc. 80, 75th Cong., 1st Sess. (1937), which sets forth the plan for the development and operation of the Colorado-Big Thompson Project (including the Green Mountain

petitioner's claim that Colorado water law prohibits charges from headwater benefits, the Commission pointed out that state water law deals with proprietary interests in the water, while the assessments for headwater benefits are unrelated to such proprietary interests—they are benefits received in the form of energy gains from controlled flow releases (Pet. App. 5b-6b).

Petitioner sought review of the Commission's order in the United States Court of Appeals for the Tenth Circuit, but at the same time went forward with the administrative hearing to establish the amount of the headwater benefit the Commission had decreed it must pay. Eventually, petitioner entered into a stipulation with the Commission's staff establishing the amount petitioner will pay for headwater benefits and the Commission's investigative costs if it is found liable for such payments.[6]

Consequently, the only question presented in the administrative hearing was whether petitioner was obligated, under Section 10(f) of the Act, to reimburse the government for the Commission's investigative costs. The Administrative Law Judge held that the statute did not impose such an obligation on petitioner (Pet. App. 1f-11f), but the Commission reversed.

Reservoir) and was adopted by Congress when it appropriated funds for the project's construction (50 Stat. 595); and (2) a stipulation and judgment (the Blue River Decree) entered in litigation between a number of parties concerning the rights to the water that flows through the Colorado-Big Thompson Project. *United States* v. *Northern Colorado Water Conservancy District,* Civ. No. 2782 (D. Colo. Oct. 12, 1955). The Blue River Decree incorporates the provisions of S. Doc. 80. Congress approved the Blue River Decree in the Colorado River Storage Project Act § 11, 43 U.S.C. 620j. The decree accordingly has the force of a statute.

[6] Petitioner agreed to pay $400,000 plus interest for the headwater benefits received prior to January 1, 1971, $330,000 for the benefits received from January 1, 1971 through December 31, 1981, and $107,000 for the Commission's investigative costs (Pet. App. 4f).

The Commission has consistently interpreted the 1935 amendments to Section 10(f) to require all upstream and downstream licensees and permittees affected by an investigation to share the Commission's investigative costs equally. Where, as here, the United States is the owner of the upstream project, however, the Commission has required the downstream project owner to bear the full cost of the investigation, because it is the only licensee or permittee "affected" by the investigation. See Section 10(f); Pet. App. 7d-8d.

3. The court of appeals affirmed both Commission orders, relying in part on grounds different from the Commission's. It agreed with the Commission that neither petitioner's pre-Federal Power Act permit nor the terms of the 1901 Act under which it was issued barred the assessment of headwater benefit charges under Section 10(f) of the Federal Power Act (Pet. App. 12a-13a). However, the court below refused to accept the Commission's distinction between the company's proprietary interest in the water and the Federal Power Act's charge against the energy produced from that water (Pet. App. 18a). Instead, the Court looked to Colorado law and found that petitioner did not have a vested right under state law to an augmented stream flow, which was the benefit for which the court concluded the charges were being assessed (Pet. App. 13a-17a). On this basis, the court of appeals found no conflict between the headwater benefit charges and the petitioner's state-created water rights. It also found nothing in S. Doc. 80 that indicated a congressional intent to provide the Shoshone Plant with water from the Green Mountain Reservoir free of all charges, particularly headwater benefit charges (Pet. App. 18a-20a). Finally, the court followed prior judicial precedent, as well as the Commission's long-standing interpretation of the statute, and affirmed the Commission's assessment of investigative costs against petitioner.

ARGUMENT

Although the court of appeals departed in some measure from the Commission's reasoning, upon which we rely here, the conclusions that the court reached were correct and do not conflict with any decision of this Court or any other court of appeals.[7] The case poses no recurring issue of general concern; it involves issues that turn on an unusual combination of federal and state laws not likely to be repeated in other cases. Moreover, the petition relies (Pet. 11-16) on contentions concerning the meaning of Colorado law that the court of appeals rejected and that do not warrant this Court's review. There is, accordingly, no reason for further review.

1. a. Relying on *United States* v. *Colorado Power Co.*, 240 F. 217 (D. Colo. 1916), petitioner asserts that the terms of its pre-Federal Power Act permit, and the statute under which it was issued, preclude the assessment of headwater benefit charges under Section 10(f) of the Federal Power Act (Pet. 9-11). Petitioner significantly misperceives the holding of that case. Indeed, *Colorado Power Co.*, fully supports the Commission's assessment of headwater benefit charges here.

At issue in that case was the obligation of the permittee to pay charges assessed by the Secretary of the Interior that were based on the energy output of the Shoshone Plant. The permittee objected both to the Secretary's right to assess an annual charge and to the amount assessed, and refused to pay it. The government then attempted to revoke the permit and have the plant and related facilities removed from public land. The district court upheld the charge assessed by the Secretary and ordered the permittee to pay it. 240 F. at 222. Although the district court ex-

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[7] A prevailing party, of course, "may defend a judgment on any ground which the law and the record permit that would not expand the relief it has been granted." *United States* v. *New York Telephone Co.*, 434 U.S. 157, 166 n.8 (1977)

pressed some reservations about the use of the "amount of electrical energy produced" by the permittee's plant as the basis for the assessment of the charge, it nevertheless concluded that "there is no present duty or purpose * * * to finally determine and adjudicate the limits of [the Secretary's] power in this regard"; in the absence of any proof that the amount assessed was "unreasonable and excessive, and more than necessary for the protection of [federal] rights * * * the manner in which it was fixed is not of present concern" (*id.* at 221).

Colorado Power Co. thus firmly established that the Shoshone Plant permittee had an obligation to pay the government annual charges, which (in the absence of any showing of unreasonableness) could be based on the energy output of the plant, much the way headwater benefit charges are assessed. Thus, far from precluding headwater benefit charges, that decision long ago established that the terms of petitioner's permit require the payment of such reasonable government charges. Petitioner is, in fact, in essentially the same position as the permittee in *South Carolina Electric & Gas Co.* v. *FPC*, 338 F.2d 898 (4th Cir. 1964), where the permit explicitly authorized the assessment of headwater benefit charges; this case was resolved by the Tenth Circuit consistently with that one. Petitioner is thus in error in asserting (Pet. 8, 10-11) that there is a conflict in the circuits.

b. Petitioner next argues that the federal laws here in issue were designed to protect its state created water rights, and that the assessment of a headwater benefit charge under Section 10(f) interferes with those vested rights (Pet. 11-16). This claim is entirely dependent on a contention concerning the meaning of state law that the court of appeals rejected. There is no reason in this case for this Court to depart from its normal practice of declining to undertake review of issues of state law.

Petitioner's contention, in any event, fails to distinguish between a proprietary right to the water and regulation of

the energy potential of the flowing stream. The distinction between a proprietary right to water, protected by Section 27 of the Federal Power Act, 16 U.S.C. 821, and state laws, and the regulation of the energy producing capability of the flowing water is fundamental to the regulatory scheme Congress enacted in Part I of the Federal Power Act. As this Court explained in *FPC* v. *Niagara Mohawk Power Corp.*, 347 U.S. 239, 252 (1953):

> The references in the Act to preexisting water rights carry a natural implication that those rights are to survive, at least until taken over by purchase or otherwise. Riparian water rights, like other real property rights, are determined by state law. Title to them is acquired in conformity with that law. The Federal Water Power Act merely imposed upon their owners the additional obligation of using them in compliance with that Act.

While the Power Act "leaves to the States their traditional jurisdiction," in this instance the authority to establish rights to the water in the stream, it does so "subject to the admittedly superior right of the Federal Government, through Congress, to regulate interstate and foreign commerce." *First Iowa Hydroelectric Cooperative* v. *FPC*, 328 U.S. 152, 171 (1946).[8] This Court has also made clear that "[t]he Federal Government has domination over the water power inherent in the flowing stream * * *. The flow of a navigable stream is in no sense private property." *United States* v. *Appalachian Power Co.*, 311 U.S. 377, 424 (1940).

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[8] As this Court has previously recognized, Congress in Part I of the Federal Power Act "drew upon its full authority under the Commerce Clause" (*FPC* v. *Union Electric Co.*, 381 U.S. 90, 96 (1960)), which is applicable because the development of the water power of navigable streams is "a by-product of the general use of the rivers for commerce." *United States* v. *Appalachian Power Co.*, 311 U.S. 377, 426 (1940).

Thus, regardless of whether the court of appeals was correct in rejecting petitioner's claim as a matter of state law, state law could not, in any event, create a vested right in the power of the flowing stream; rather that is the precise focus of the Federal Power Act, particularly Section 10(f). Headwater benefit charges assessed under Section 10(f) are based on the increased energy produced from the flowing water as a result of upstream alterations of the stream flow. Hence, state water law, preserved by Section 27, is irrelevant to the assessment of headwater benefits under Section 10(f) and cannot form the basis for an exemption from the obligations of Section 10(f).

c. Petitioner errs in claiming that S. Doc. 80, which contains the congressionally approved terms for the operation of the Green Mountain Reservoir (the upstream project), exempts petitioner from headwater benefit charges. That document simply guarantees that the Shoshone Plant will continue to receive the amount of its vested appropriation of water without charge. It provides no basis for assuming that Congress, sub silentio, intended to waive the very different headwater benefit charges when it authorized the reservoir construction. It is well established that legislative grants of rights, powers, privileges, immunities or benefits are to be strictly construed. *United States* v. *Grand River Dam Authority,* 363 U.S. 229, 235 (1960); *Northern Pacific R.R.* v. *United States,* 330 U.S. 248, 257 (1947). Moreover, the assessment for headwater benefits is pursuant to a federal statute, Section 10(f) of the Federal Power Act, that is not even referred to in S. Doc. 80. The repeal of a statute by implication is disfavored. *Watt* v. *Alaska,* 451 U.S. 259, 273 (1981); *Morton* v. *Mancari,* 417 U.S. 535 (1974). Consequently, it would be inappropriate to assume, without basis in the language or legislative history of S. Doc. 80, that Congress intended when it approved that document to exempt petitioner from Section 10(f) of the Federal Power Act.

Nor are the provisions of S. Doc. 80 inconsistent with Section 10(f) of the Federal Power Act, since the purpose of each is different. The purpose of paragraphs (b) and (c) of S. Doc. 80 (quoted at Pet. App. 1j-3j) is to insure that water users on the western slope of the Colorado Continental Divide will not be deprived of an adequate water supply because of diversion of water to the eastern slope. In addition, although the Green Mountain Reservoir project was to be largely self-supporting, paragraph (c) makes clear that no charge is to be made for releasing water that would have gone to western slope users in the absence of the federal project. In other words, western slope users were not to pay for the right to *continue* to receive water that they would have received if the Green Mountain Reservoir had never been constructed. Section 10(f) of the Federal Power Act, on the other hand, is addressed to the *enhancement* of the power production potential of the water released in a regulated stream from the Green Mountain Reservoir. Its very different purpose is to insure that any *enhanced* production of downstream projects is not wholly subsidized by the upstream improvements.

2. Finally, petitioner attacks the Commission's long-standing interpretation of the language of Section 10(f), requiring the assessment of the Commission's investigative costs (Pet. 16-18).[9] Petitioner argues that the first para-

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[9] Section 10(f) provides in relevant part:

> [w]henever any licensee hereunder is directly benefited by the construction work of another licensee, a permittee, or of the United States of a storage reservoir or other headwater improvement, the Commission shall require as a condition of the license that the licensee so benefited shall reimburse the owner of such reservoir or other improvements for such part of the annual charges for interest, maintenance, and depreciation thereon as the Commission may deem equitable. * * * The licensees or per-

graph of Section 10(f) refers exclusively to licensees, and that only the final paragraph deals with the obligation of permittees. Since the requirement to pay investigative costs appears in the first paragraph, and not in the final one, petitioner concludes that only licensees must pay such costs. Recognizing the legislative intent to create equal obligations for licensees and permittees, petitioner further narrows the scope of the statutory obligation to pay investigative costs by reading it as applying only to the owner of the upstream project, which benefits from the Commission's investigation because it receives the headwater benefit payments (Pet. 18 n.23).[10]

Petitioner's reading of Section 10(f) ignores the plain language of the first paragraph itself, which requires all "licensees or permittees affected" to pay the Commission's investigative costs. Congress could easily have limited the payment obligation to licensees only (although it is hard to imagine any policy that would justify it in doing so) or it could have required only those who benefitted from the investigation to pay its costs. Instead, it imposed that requirement on all licensees and permittees "affected" by the investigation. Petitioner is certainly an affected permittee; accordingly, the plain terms of the statute require it to bear costs of the investigation.

Even if petitioner's reading of the statutory language were a reasonable one, it would not prevail over the Com-

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mittees affected shall pay to the United States the cost of making such determination as fixed by the Commission.

* * * * *

Whenever any power project not under license is benefited by the construction work of a license or permittee, the United States or any agency thereof, the Commission * * * shall determine and fix a reasonable and equitable annual charge to be paid * * * on account of such benefits * * *.

[10] To the extent that this "benefits" argument recognizes that upstream permittees, as well as licensees, may be required to pay investigative costs, it is inconsistent with petitioner's primary argument that the first paragraph deals only with the obligations of licensees.

mission's alternative long-standing interpretation, which is also reasonable and consistent with congressional intent. See, *e.g.*, *American Paper Institute, Inc.* v. *American Electric Power Service,* 461 U.S. 402 (1983); *Ford Motor Credit Co.* v. *Milhollin,* 444 U.S. 555, 566 (1980); *Norwegian Nitrogen Products Co.* v. *United States,* 288 U.S. 294, 315 (1933).

Both the last sentence of the first paragraph, requiring payment of the Commission's investigative costs, and the final paragraph, imposing the obligation to pay headwater benefits on permittees, were added in 1935 at the request of the Federal Power Commission. Since enactment, the Commission has consistently interpreted the statute to require investigative costs to be divided equally between the non-federal owners of the upstream and downstream projects involved in the investigation (Pet. App. 7d, 12d-13d). Where the upstream project is owned by the United States, the Commission has consistently charged all of its investigative costs to the owner of the downstream project, since that owner is then the only "licensee[] or permittee[] affected" by the investigation (Pet. App. 8d). The Commission's interpretation furthers the general purpose of Part I of the Act to recover all of the costs of administering that part of the statute from the private parties affected by the Act. § 10(e), 16 U.S.C. 803(e).[11]

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[11] See *Kokoszka* v. *Belford,* 417 U.S. 642, 650 (1974) (citation omitted) ("When 'interpreting a statute, the court will not look merely to a particular clause * * *, but will take in connection with it the whole statute * * * and the objects and policy of the law, as indicated by its various provisions, and give to it such a construction as will carry into execution the will of the Legislature.' ").

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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DECEMBER 1985

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No. 85-573

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

PUBLIC SERVICE COMPANY OF COLORADO,
Petitioner,
v.
FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF OF PUBLIC SERVICE COMPANY OF COLORADO

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December 1985

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REPLY BRIEF OF PUBLIC SERVICE COMPANY OF COLORADO

Pursuant to Sup. Ct. R. 22.4, Public Service Company of Colorado hereby replies to the brief in opposition for the Federal Energy Regulatory Commission. By its very persistence in refusing to defend the Tenth Circuit's reasoning below, the FERC's brief points up the inadequacies of the court's decision and underscores the need for review here.

1. The FERC makes no pretense of supporting the Tenth Circuit's holding that, by amending section 10(f) of the Federal Power Act in 1935, Congress intended to override the terms of pre-1920 permits and "transfer jurisdiction" over such permits to the Federal Power Commission. 754 F.2d at 1563 (Pet. App. 12a-13a). That holding ignores section 23(a) of the Power Act,

which was enacted simultaneously with the amendment of section 10(f) and which specifically disclaimed any intent to "affect" the rights of pre-1920 permittees.[1] The Tenth Circuit's holding also conflicts with *South Carolina Electric & Gas Co.* v. *FPC*, 338 F.2d 898 (4th Cir. 1964), under which the terms of a pre-1920 permit determine whether headwater charges may be levied.[2] (Pet. 9-11.)

Instead of defending the Tenth Circuit's holding, the FERC claims that, as construed in *United States* v. *Colorado Power Co.*, 240 F. 217 (D. Colo. 1916), the Shoshone permit *does* authorize the imposition of headwater benefits charges, and that the present case was therefore "resolved by the Tenth Circuit consistently with [*South Carolina*]." (Opp. 8.) The agency's assertion simply blinks the fact that 1901 Act permits were issued "under general regulations to be fixed by the Secretary of the Interior," and those regulations *nowhere* provide for anything akin to headwater benefits charges. 31 Pub. Lands Dec. 13-18. The FERC likewise ignores the court's unambiguous statement in *Colorado Power* that to levy a charge based upon electric output would "carry the power granted to [the Secretary] to a doubtful length and further than, I think, is given by the Act." 240 F. at 221.[3] The Shoshone permit does not admit of

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[1] Very recently, in reversing a FERC order as inconsistent with section 23(a), the Court of Appeals for the D.C. Circuit has stressed the breadth of the prohibition in that section against action "affecting" the rights of pre-1920 permittees. Washington Water Power Co. v. FERC, 775 F.2d 305, 325 (D.C. Cir. Oct. 18, 1985).

[2] Nor is there any statute purporting to "transfer jurisdiction" of permits under the Act of February 15, 1901, from the Secretary of the Interior to the FERC. (See Pet. 7.)

[3] The monthly charge of some $100 in *Colorado Power* was upheld because not shown to be "more than necessary in the protection of [the Government's] rights." 240 F. at 221. Those "rights," the court made clear, are the specific rights not to suffer injury from

headwater benefits charges, and the FERC's effort to circumvent the point of conflict with *South Carolina* is unavailing.

In short, the question whether the Federal Power Act imposes headwater-benefits liability on pre-1920 permittees, when there is no such reservation in the permit or the permit-authorizing statute, involves the construction of federal legislation on a matter of continuing importance. The Tenth Circuit's reasoning cannot be defended, and the FERC makes no effort to do so. There is a direct conflict between the holding of the Tenth Circuit and the approach adopted by the Fourth Circuit in *South Carolina*.

2a. The brief in opposition likewise declines to defend the court of appeals' holding that Public Service Company lacks state water rights in releases from Green Mountain Reservoir. Instead, the FERC claims that, because state water rights are merely "proprietary" in nature, section 27 of the Federal Power Act (which provides that nothing in the Act will "in any way interfere with" state water rights) does not preclude regulation of the "energy potential" of the water (Opp. 8-9); indeed, state water rights are said to be "irrelevant" to headwater benefits charges (Opp. 10).

This alleged distinction, on which the FERC now relies in opposition to certiorari, would trivialize section 27 and is untenable. Section 27 forbids the FERC to override state water law and, as the Tenth Circuit observed, does *not* permit the FERC "to assess charges for the use of water to which PSC has a vested right . . . ." 754 F.2d at 1566 (Pet. App. 18a). The FERC's extravagant claim of federal preemptive authority, and its

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waste of the Government lands surrounding the project. *Id.* Clearly, the Government's authority to charge for waste is not tantamount to authority to levy fees that by some other measure might be deemed reasonable.

casual disregard of state rights protected by section 27, are inconsistent with the very decision it is seeking to defend.[4]

2b. Public Service Company's petition argued, as a further basis for certiorari, that paragraph (c) of Senate Document No. 80 granted Shoshone the use of 1,250 c.f.s. "without charge" and that paragraph (d) explicitly assigned to others (who contract with the federal government) the very costs here sought to be recovered from Shoshone.[5] The Tenth Circuit said that the "without charge" language did not apply to Shoshone, even though Shoshone's right to 1,250 c.f.s. is preserved in the language that immediately follows the "without charge" clause in the same paragraph. In opposing certiorari, the FERC conspicuously declines to defend the Tenth Circuit's strained reading of the "without charge" requirement of paragraph (c). (See Pet. 15 n.19.)

Instead, the FERC claims that paragraph (c) is designed to protect Western Slope users (such as Shoshone) only against charges for *replacement of water diverted to the Eastern Slope* and not against charges for enhanced flows created by the Green Mountain development. (Opp. 11.) This is an impossible reading of paragraph (c) which, needless to say, the Tenth Circuit itself did not adopt. The "without charge" language (quoted at Pet. 4) is expressly directed to the 100,000 acre-foot pool of *enhancement* water; the separate 52,000 acre-foot pool of *replacement* water is covered not by paragraph (c) but by paragraph (b) (Pet. App. 2j). The "without

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[4] The FERC says that this Court does not ordinarily review determinations of state law even by federal courts. (Opp. 8.) However, the FERC is not attempting to defend the lower court's mistaken statements about Colorado law. It is instead urging construction of a federal statute in order to sustain the result below.

[5] The FERC concedes that Senate Document No. 80 has been embodied in subsequent legislation and has the force of a federal statute. (Opp. 4-5 n.5.)

charge" provision in paragraph (c) thus applies explicitly, and exclusively, to enhancement water, and the FERC's argument is utterly without basis.[6]

3. Finally, the FERC claims that the "plain language" of the first paragraph of section 10(f) of the Power Act allows it to impose investigative costs upon pre-1920 permittees, such as Public Service Company, that are being assessed headwater benefits charges. (Opp. 12.) The language of that first paragraph (which begins "whenever any *licensee* hereunder is directly benefited") is, indeed, plain. It says that permittees and licensees pay investigative costs when a *licensed* project is the downstream, *i.e.*, "benefited," project. Shoshone, the downstream project allegedly benefited in the present case, is an *unlicensed* project and is therefore not within the ken of the first paragraph.

Situations where an unlicensed project such as Shoshone are downstream are explicitly covered by the third paragraph (beginning "whenever any power project not under license is benefited . . ."), which nowhere provides for levying investigative costs on anyone. The statute cuts cleanly between the two situations and its language could hardly be clearer. Claims that the agency's construction is entitled to weight (Opp. 12-13) provide no basis for overriding the plain language chosen by Congress.[7]

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[6] The FERC's concession that under S. Doc. 80 Green Mountain Reservoir was to be "largely" self-supporting (Opp. 11) does not go quite far enough. Paragraph (d) of S. Doc. 80 specifies that "*the* costs of construction and perpetual operation and maintenance" (emphasis added) are to be recovered from parties on the Eastern Slope or elsewhere who contract with the Secretary, *i.e.*, from parties other than the owner of Shoshone.

[7] The FERC's claim of a longstanding and unqualified administrative construction in its favor is not easily squared with the fact that the agency found it necessary to overrule its own Administrative Law Judge in this case. The ALJ held that the FERC could not impose investigative costs on Shoshone. (Pet. App. F.)

CONCLUSION

For the reasons stated above and in the petition, certiorari should be granted.

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